CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 29

RICHEY V. GRAHAM, PETITIONER,

vs.

THE WHITE-PHILLIPS COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 23, 1935.

CERTIORARI GRANTED MAY 27, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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1 Pleas in the district court of the United States of America, within and for the Southern Division of the Southern District of Illinois, held at the City of Springfield, in said division and district, before the Honorable Louis Fitz-Henry, Judge of said court, on Monday, the first day of June, in the year of our Lord one thousand nine hundred and thirty-one and of the Independence of the United States of America, the one hundred and fifty-fifth year. Placita.

Present:

Louis FitzHenry, District Judge.
C. W. Cushing, United States Marshal.
Frank K. Lemon; United States Attorney.
S. T. Burnett, Clerk.

Attest:

S. T. BURNETT,
Clerk.

from Court ly 2.

2 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois,

Southern Division.

Edward J. Barrett, Treasurer of the State of Illinois *vs.* The White-Phillips Co., Inc., and Richey V. Graham.	No. 1539. In Equity.

Be it remembered that heretofore to wit: on the second day of July, in the year of our Lord one thousand nine hundred and thirty-one, that being one of the days of the June Term, A. D. 1931, of the district court of the United States for the Southern Division of the Southern District of Illinois, there was filed in the office of the clerk of said court, a certain transcript on removal of the proceedings had in said cause in the Circuit Court of Sangamon County, Illinois, which said transcript on such removal was and is in the words and figures, following, to wit:

3 State of Illinois, } ss.
Sangamon County. }

Pleas, before the Hon. Chas. G. Briggle, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court, begun and held in the Court House in the City of Springfield, County and State aforesaid on the first Monday (the same being the fourth day) of May in the year of Our Lord One Thousand Nine Hundred and Thirty-one.

Present:

Hon. Chas. G. Briggle, Judge.
H. E. Fullenwider, State's Attorney.
Samuel T. Metcalf, Sheriff.
R. G. Moore, Clerk.

4 Be It Remembered That on the 22nd day of May A. D. 1931, there was filed in the office of the Clerk of the Sangamon County Circuit Court, a certain Bill of Interpleader; a copy of said Bill being as follows to-wit:

5 State of Illinois
County of Sangamon. } ss.

IN THE CIRCUIT COURT

May Term, A. D. 1931.

Edward J. Barrett, Treasurer of the State of Illinois,
Complainant,
vs.
The White-Phillips Company, Inc., and Richey V. Graham,
Defendants.

BILL OF INTERPLEADER.

To the Honorable Presiding Judge of the Circuit Court of the County of Sangamon, State of Illinois; in Chancery Sitting:

1. Your orator, Edward J. Barrett, Treasurer of the State of Illinois, respectfully represents unto your Honor that he is the duly elected and qualified Treasurer of said State, and that the defendant, White-Phillips Company, Inc., a corporation, of Davenport, Iowa, has presented to him for payment as such Treasurer Coupons numbered 2847 to 2849 and 18897 to 18901, inclusive, each for the sum of Twenty Dollars ($20.00), due March 1st, 1931, which said coupons represent the interest then due on eight Illinois State highway bonds so numbered and dated March 1, 1925, and each being in the amount of One Thousand Dollars, and three of which said bonds will become due on March 1, 1946 and the remaining five of which said bonds will become due on March 1, 1954, to which said bonds said several coupons had been previously attached, and all of which said bonds your orator is advised are held by said White-Phillips Company, Inc., which claims to be the owner thereof, together with said detached coupons and all other

coupons subsequently due and remaining attached to said bonds.

6 2. Your orator further represents that the defendant Richey V. Graham also claims to be the owner of said bonds and coupons and has notified and ordered your orator to refuse payment of any and all of said coupons and any other coupons and the principal amount of any and all of the aforesaid bonds to the said White-Phillips Company, Inc., or to any one in its behalf, and alleges and claims that the said bonds and coupons were stolen from him on or about the first day of September, 1930, and that he is still the sole owner and entitled to the payment thereof; and your orator therefore represents that he is unable to determine the ownership of said bonds and coupons or to whom the payment thereof should be made.

3. Your orator further represents that he has always been and now is willing to pay the amount due on said coupons and bonds to whatever person or company may be lawfully entitled to receive the same, and to whom he could pay the same in safety; and he hereby offers to bring the said amount now due on said coupons into Court, or to pay the same, as the Court shall direct.

4. And your orator further represents that he does not in any respect collude with either of the said defendants, touching the matters in controversy in this cause, nor is he in any manner indemnified by the defendants, or either of them; nor has he exhibited this, his bill of interpleader, at the request of the defendants, or either of them, but merely of his own free will and to avoid being molested, vexed and harassed touching the matters contained herein.

5. Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity; and to the end that the said White-Phillips Company, Inc., and Richey V. Graham, who are made parties defendant to this bill, may be required to make full and direct answer to the same; and that the defendants may severally set forth to which of them

7 the said coupons and bonds do of right belong and are payable, and how in particular they make out their claim thereto; and that the defendants may interplead, and settle and adjust their said demands between themselves; your orator being willing and desirous, and agreeing that all sums due or to become due on said coupons or bonds may be paid to such of them to whom the same shall, in the judgment of the Court, appear of right to belong; and that your orator may be

at liberty to bring and pay the said amount now due on said coupons into this Honorable Court, which oyur orator hereby offers to do, for the benefit of such of the defendants as shall appear to be entitled thereto, and subject to the further order of the Court; and that your orator may have such other and further relief in the premises as equity may require, and to your Honor shall seem meet; and your orator will ever pray, etc.

EDWARD J. BARRETT,
Treasurer of the State of Illinois.

OSCAR E. CARLSTROM
Attorney General, Solicitor for Complainant.

B. L. CATRON
JAMES W. GULLETT
Assistant Attorneys General, Of Counsel.

8 State of Illinois, County of Sangamon. } ss.

EDWARD J. BARRETT, being first duly sworn, on his oath states that he is Treasurer of the State of Illinois, and that as such Treasurer he has exhibited his bill of interpleader against the defendant, White-Phillips Company, Inc., a corporation, and Richey V. Graham, named in the foregoing bill, without any fraud or collusion between him and the said defendants or either of them; and he has not exhibited his said bill at the request of the said defendants, or either of them; and further states, that he has exhibited his said bill with no other intent but to avoid being sued or molested by the said defendants, and to determine the ownership and right to the recovery of the funds mentioned in said bill.

EDWARD J. BARRETT

Subscribed and sworn to before me this 22nd day of May, A. D. 1931.

FRANK E. POKARNEY,
Notary Public.

(Notarial Seal)

Filed May 22, 1931 R. G. Moore, Clerk.

docketing 9 And Afterwards to-wit on the 4th day of June, A. D. 1931, the same being one of the term days of the May Term, A. D. 1931 of the Sangamon County Circuit Court, the following proceedings were had and entered of record to wit:

• • (Caption) • •

This day comes the complainant by the Attorney General and upon motion leave of Court is given to docket this cause at the present term of this Court.

And the appearance of each defendant is entered in writing, waiving the issuing and service of process.

And upon motion of the said complainant by the Attorney General it is ordered by the Court that the defendants be and they are ruled to answer the Bill by the 18th inst.

ance. 10 And Afterwards to-wit on the 4th day of June, A. D. 1931, there was filed in the office of the Clerk of the Sangamon County Circuit Court, the Entry of Appearance of The White-Phillips Company, Inc.; a copy of said Entry of Appearance being as follows to-wit:

11 In the Circuit Court of Sangamon County.

• • (Caption) • •

ENTRY OF APPEARANCE.

The undersigned, The White-Phillips Company, Inc., a corporation, one of the defendants in the above entitled cause, by William L. Patton, its attorney and solicitor, hereby waives time and the issuance and service of process upon it as such defendant, and enters it appearance as a defendant herein to the present May Term of said Court, to the same intent and as fully and effectually in all respects as though it had been duly served with process of summons in said cause more than ten days prior to the present May Term of said Court.

The White-Phillips Company Inc.
Defendant,
By William L. Patton
Its Attorney and Solicitor.

Filed June 4, 1931 R. G. Moore, Clerk.

12 And Afterwards to-wit on the 4th day of June, A. D. 1931, there was filed in the office of the Clerk of the Sangamon County Circuit Court, the Entry of Appearance of Richey V. Graham: a copy of said Entry of Appearance being in the words and figures as follows to-wit: Appear

13 IN THE CIRCUIT COURT OF SANGAMON COUNTY.

• • (Caption) • •

ENTRY OF APPEARANCE.

I, Richey V. Graham, one of the defendants in the above entitled cause, hereby enter my appearance as such defendant in said cause, and waive the issuance and service of process upon me as such defendant, and consent that said cause may be heard and determined, and that thereupon a decree may be entered therein at the present May term of said Court, as fully and effectually in all respects as though I had been duly served with process as such defendant in said cause more than ten days prior to the present May term of said Court.

RICHEY V. GRAHAM
Defendant.

I, James J. Barbour hereby enter my appearance as solicitor for the defendant, Richey V. Graham, in the above entitled cause.

JAMES J. BARBOUR,
105 W. Madison St., Chicago, Ill.
Solicitor for Richey V. Graham, Deft.

Filed June 4, 1931. R. G. Moore, Clerk.

14 And Afterwards to-wit on the 10th day of June, A. D. 1931, the same being one of the term days of the May term, A. D. 1931 of the Sangamon County Circuit Court, the following proceedings were had and entered of record to-wit:

• • (Caption) • •

The defendant White-Phillips Company, Inc. by its solicitors presents and files its Notice, Petition and Bond for Removal of this cause to the District Court of the United States for the Southern District of Illinois, Southern Division.

15 And Afterwards to-wit on the 10th day of June, A. D. 1931, there was filed in the office of the Clerk of the Sangamon County Circuit Court, in the within case, Notice, Proof of Notice, Petition and Bond for Removal: a copy of said Notice, Proof of Notice, Petition and Bond being as follows to-wit:

16 IN THE CIRCUIT COURT OF SANGAMON COUNTY.

* * (Caption) * *

To Edward J. Barrett, Treasurer of the State of Illinois, Complainant, and his Attorney,—and

To Richey V. Graham, and to James J. Barber, his Attorney:

Please Take Notice that The White-Phillips Company, Inc., defendant, in the above cause, will, on the 10th day of June, 1931, at the hour of 9:00 o'clock in the Forenoon of that day, file in the Circuit Court of the County of Sangamon and State of Illinois, and in the Clerk's office thereof, in which said suit is now pending, its Petition and Bond for the Removal of the said cause from the said Court to the District Court of the United States for the Southern District, Southern Division of Illinois, and that on the 15th day of June, 1931, at 9:00 o'clock in the Forenoon of that day, od as soon thereafter as counsel can be heard, said Petition and Bond will be called up for hearing and disposition before the above Court in which this action is pending, at which time and place you may be present if you so elect.

Copies of said Petition and Bond are served herewith.

Dated the 8th day of June, 1931.

WILLIAM L. PATTON
Solicitor for The White-Phillips Company, Inc., Petitioner.

Filed June 10, 1931 R. G. Moore, Clerk.

Service of the above Notice is accepted this 8th day of June, 1931.

OSCAR E. CARLSTROM,
Atty. General,
Attorney for Complainant,
Atty. for Deft, Richey V. Graham.

X JAMES J. BARBOUR
by W. EDGAR SAMPSON.

17 IN THE CIRCUIT COURT OF SANGAMON COUNTY.

• • (Caption) • •

PROOF OF SERVICE OF NOTICES.

State of Illinois }
County of Sangamon }

WILLIAM L. PATTON, being first duly sworn, on oath states that on Monday, June 8th, 1931, he served upon the Attorney for the Complainant, a written notice that on June 10th, 1931, at 9:00 o'clock A. M., he would file in the Circuit Court of Sangamon County, State of Illinois, the petition and bond of White-Phillips Company, Inc., defendant for removal of said cause from the said Circuit Court to the District Court of the United States for the Southern District, Southern Division of Illinois, and with said notice delivered a copy of said petition and bond, and notifying said attorney that on June 15th, 1931, at 9:00 o'clock A. M., he would appear in said Circuit Court and present said petition and bond to said Court.

Affiant further states that on June 9th, 1931, he caused to be delivered to Hon. James J. Barbour, attorney for defendant Richey V. Graham, a like written notice, together with a copy of said petition and bond.

WILLIAM L. PATTON

Subscribed and Sworn to before me this 9th day of June, 1931.

L. M. IRVING
Notary Public.

(Notarial Seal)

Filed June 10, 1931, R. G. Moore, Clerk.

18 IN THE CIRCUIT COURT OF SANGAMON COUNTY.

• • (Caption) • •

PETITION FOR REMOVAL.

To the Circuit Court of the County of Sangamon, State of Illinois:

The Petition of The White-Phillips Company, Inc., a corporation organized and existing under the Laws af the State of Delaware, a Defendant in the above entitled cause, respectfully shows to the Court:

I.

The above entitled suit has been brought in this Court and is now pending therein;

II.

Said action is of a civil nature in equity and is brought by Edward J. Barrett, Treasurer of the State of Illinois, Complainant, against The White-Phillips Company, Inc., and Richey V. Graham, Defendants, for the purpose of having a jurisdictional determination of the ownership of eight (8) State of Illinois 4% Highway Bonds, dated March 1, 1928, each in the principal sum of One Thousand ($1,000.00) Dollars, and also to determine to whom of said two defendants the interest upon said bonds due March 1, 1931, in the sum of Twenty ($20.00) dollars on each bond, should be paid by the Complainant.

19 The Complainant is a mere stake-holder, having no interest in the bonds or the money due upon said coupons and the two defendants are the real adversary parties, each claiming the bonds and the amount due upon said interest coupons and the Prayer of the Bill is that the two adversary parties (the defendants) shall interplead and settle and adjust their said controversy between themselves.

III.

The above entitled action involves a controversy which is wholly between citizens of different States, in that the defendant The White-Phillips Company, Inc., one of the ad-

versary parties in said cause, was at the time of the commencement of the said suit in this Court and still is, a corporation organized and existing under and by virtue of the Laws of the State of Delaware, and a citizen of said State of Delaware and a resident of the said State of Delaware, and having its principal place of business in Davenport, in the State of Iowa, and is not a resident of the State of Illinois, and Petitioner avers that the said Richey V. Graham the other adversary party, and defendant, was at the time of the commencement of said suit and still is, a citizen of the State of Illinois and a resident of the State of Illinois, and the controversy in this action and every issue of fact and law therein is wholly between the said The White-Phillips Company, Inc., on the one hand and the said Richey V. Graham on the other hand, who are citizens of different States and the said controversy can be fully determined as between them and is a wholly separable controversy between them, the said defendants, and not a controversy between them, the said defendants, or either of them and the said Complainant, who is a mere stake-holder and nominal party Complainant in the said cause.

20 The fundamental and primary controversy as set forth in the said Bill of Complaint is whether The White-Phillips Company, Inc., defendant, is entitled to the said bonds and the said interest or whether the defendant Richey V. Graham is entitled to the same and the said stake-holder Complainant is not a necessary party to the determination of said question, but said question is a separable controversy which is wholly between the said The White-Phillips Company, Inc., and the said Richey V. Graham and which can be fully determined as to them without the presence of the said Complainant as a party in this cause.

IV.

Said action is one of which the District Courts of the United States are given original jurisdiction.

V.

The time within which your Petitioner is required by the Laws of this State and the rules of this Court to answer or plead to the Bill of Complaint in the above entitled action has not yet expired.

VI.

The value of the matter in controversy in said action exceeds Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, as appears from the allegations of the Bill of Complaint herein.

VIII.

Petitioner presents herewith, a bond with good and sufficient surety conditions that it will enter in the District Court og the United States for the Southern District of Illinois, Southern Division, within thirty (30) days from the date of filing of this Petition, a certified copy of the record in this suit, and that it will pay all costs that may be awarded by the said District Court in case the said Court shall hold that this suit was wrongfully or improperly removed thereto.

21 VIII.

Prior to the filing of this Petition and of said Bond for the Removal of this Cause, written notice of intention to file the same was given by Petitioner to the Complainant in the said cause and also to the Defendant, Richey V. Graham, as required by law, a true copy of which, with proof of the service of the same, is attached hereto.

Prayer.

Wherefore, your Petitioner prays that this Court proceed no further herein, except to make an Order of Removal as required by law and to accept said surety and bond and to cause the record herein to be removed into said District Court of the United States within and for the Southern District, Southern Division of the State of Illinois, according to the Statutes in such cases made and provided.

Dated this 5th day of June, 1931.

THE WHITE-PHILLIPS CO. INC.
Petitioner.

WILLIAM L. PATTON
Attorney for Petitioner.

State of Iowa }
County of Scott }

ROBERT ALEXANDER, being first duly sworn, on oath, states that he is the Vice President of The White-Phillips Company Co. Inc., the Petitioner above named; that he has read the foregoing Petition, and that the same and the allegations thereof are true of his own knowledge, excepting as to matters which are therein stated to be alleged on information and belief and as to those matters he believes it to be true.

ROBERT ALEXANDER

Subscribed and Sworn to before me this 5th day of June, 1931.

N. EHLERS
Notary Public.

(Notarial Seal)

Filed June 10, 1931 R. G. Moore, Clerk.

22 IN THE CIRCUIT COURT OF SANGAMON COUNTY. Removal

* * * (Caption) * * *

Know All Men by These Presents, that We, The White-Phillips Company, Inc., as Principal and, Hartford Accident and Indemnity Company of Hartford, Connecticut, as Surety, are held and firmly bound unto Edward J. Barrett, Treasurer of the State of Illinois, Complainant, and unto Richey V. Graham, defendant, in the above entitled cause, their successors and assigns, in the penal sum of One Thousand ($1,000.00) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, our heirs, executors, successors, jointly and severally by These Presents.

The Conditions of this obligation are that whereas, the said The White-Phillips Company, Inc., has applied by Petition to the Circuit Court of the County of Sangamon and State of Illinois, for the removal of the above entitled cause from the said Circuit Court to the District Court of the United States for the Southern District, Southern Division of the State of Illinois.

Now, if the said The White-Phillips Company, Inc., shall

enter in the said District Court of the United States, for the said Southern District, Southern Division of Illinois, within thirty (30) days from the date of filing of the Petition of such removal a certified copy of the record in said suit, and shall well and truly pay all the costs that may be awarded by said District Court if it shall hold that said suit was wrong-
23 fully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

THE WHITE-PHILLIPS CO. INC. (Seal)
By ROBT. ALEXANDER
(Sea) *Its Vice President.*
HARTFORD ACCIDENT AND INDEMNITY COMPANY (Seal)
By H. G. LOHMILLER, (Seal)
Attorney-in-fact.

Filed June 10, 1931 R. G. Moore, Clerk.

Order. 24 And Afterwards to-wit on the 15th day of June A. D. 1931, the same being one of the term days of the May Term, A. D. 1931 of the Sangamon County Circuit Court, the following proceedings were had and entered of record to-wit:

• • (Caption) • • •

This day come the parties hereto by their respective solicitors and on motion of the defendant Richey V. Graham by his solicitor it is ordered by the Court that the hearing on the petition to remove this cause to the District Court of the United States for the Southern District of Illinois, Southern Division be and the same is continued to the 20th inst.

25 And Afterwards to-wit on the 18th day of June, A. D. 1931, there was filed in the office of the Clerk of the Sangamon County Circuit Court, the Answer of Richey V. Graham; a copy of said Answer being in the words and figures as follows to-wit:

26 • • (Caption) • • Filed 193

THE ANSWER OF RICHEY V. GRAHAM TO THE BILL OF COMPLAINT OF EDWARD J. BARRETT, TREASURER OF THE STATE OF ILLINOIS.

To the Honorable Presiding Judge of the Circuit Court of the County of Sangamon, State of Illinois, in Chancery Sitting:

Now comes the defendant, Richey V. Graham, one of the defendants in the above entitled cause, by James J. Barbour and Doyle, Sampson & Griffin, his solicitors, and makes answer to the said bill of complaint, and answering says that he is and long has been a resident of Cook County and State of Illinois.

1. That he admits that the complainant is the Treasurer of the State of Illinois duly elected and qualified, and further states that he is advised and believes it to be true that the defendant White-Phillips Company, Inc., of Davenport, Iowa, has presented to the complainant for payment as such Treasurer, coupons Numbered 2847 to 2849 and 18897 to 18901 inclusive, each for the sum of Twenty Dollars ($20.00), due March 1st, 1931, which said coupons represent the interest then due on eight Illinois State Highway Bonds so numbered and dated March 1, 1925, and each bond being in the amount of One Thousand Dollars, and three of which said bonds will become due on March 1, 1946, and the remaining five of which said bonds will become due on March 1, 1954, to which said bonds said several coupons had been previously attached, but whether or not said bonds and coupons are accordingly

27 held by said White-Phillips Company, Inc., and whether the said company is incorporated, and what claims of ownership the said White-Phillips Company, Inc., has, or claims to have to said coupons and to said bonds, and to all other coupons subsequently due and remaining attached to or a part of said bonds, or any one of said bonds, or any one of said coupons, this defendant has no knowledge except as advised in said bill, and demands strict proof of each and every of said allegations and claims.

2. This defendant admits as stated in the Bill of complaint that he claims to be the owner of the aforesaid bonds and coupons, and admits that he has notified and ordered the complainant to refuse payment of any and all of said coupons

and any other coupons and the principal amount of any and all of the aforesaid bonds to the said White-Phillips Company, Inc., or to any one in its behalf, and alleges and claims that the said bonds and coupons were stolen from him on or about the first day of September, 1930, and that he is still the sole owner and entitled to the payment thereof.

3. This defendant further answering, admits that the complainant is and always has been and is now willing to pay the amount now due on said coupons and bonds to whatever company may be lawfully entitled to receive the same, and to whom he could pay the same in safety, pursuant to which allegations in the said bill of complaint the complainant offers in his said bill to bring the said amount now due on said coupons into court, or to pay the same, as the Court shall direct, but this defendant states that the amount due on said coupons on March 1, 1931, is $160.00 only, and this defendant states and shows that the only other amount undue on said bonds are the coupons due on September 1, 1930, amounting to $160.00, which said coupons and said amount are in fact and in law due to this defendant, but have not by the allegations of the bill of complaint been brought into or made a part of the bill of inter pleader filed by the complainant herein.

28 4. This defendant further answering, admits that the complainant does not in any respect collude with either of the defendants herein, and all of the other allegations made by the complainant in Paragraph 4 of the said bill of complaint.

5. Further answering, this defendant states to the Court that on and prior to Saturday, August 30, 1930, he was the possessor and owner of said eight highway bonds number 2847 to 2849 and 18897 to 18901 inclusive, as well as twenty-seven like bonds, each of the face value of $1000.00, and all coupons attached to said bonds, being the coupons due September 1, 1930, and all coupons due subsequently thereto.

6. Further answering, this defendant shows that sometime on Saturday August 30, 1930, the said bonds were stolen from the defendant and from his home at 1916 South Austin Boulevard, Cicero, Cook County, Illlinois, by some person or persons then and ever since unknown to the defendant, who burglarized his home while the said home was vacant, this defendant and his family and household being temporarily absent from said home, and in the burglary the burglar or burglars took, stole and carried away wearing apparel and

other personal property including said $35,000.00 of State highway bonds with the coupons attached thereto, all of the value of $40,000.00 and upwards, no part or portion of the larceny and burglary having ben recovered by the said defendant, or anyone acting for him, and this defendant being entirely in ignorance of where any part of said stolen property is, except as advised by said bill of complaint and other like information, as well as the admission to him of the defendant White-Phillips Company, Inc., that they are the possessors of the said eight State Highway bonds and the coupons attached thereto described in the said bill of complaint.

7. This defendant further states that upon the discovery of said burglary and larceny, and on, to-wit: September 2, 1930, he caused widespread notice to be given to the police, the banks and investment houses, and to State Treasurer of Illinois, and other State authorities, of the said theft of all of the said thirty-five State highway bonds and coupons,
29 which said notice and knowledge of the theft of said bonds was had by the said defendant White-Phillips Company, Inc., as this defendant is advised and believes and so states and charges the fact to be.

8. This defendant further answering said bill, states that in fact and in law he is the true owner of and entitled to the possession of the said eight Illinois State Highway Bonds described in the said bill of complaint and in this answer, and the coupons that were attached thereto due on and after September 30, 1930, and of the other twenty-seven of said bonds and said coupons so taken from his home and stolen from this defendant.

9. And this defendant further answering, states that his right, claim and ownership to the said bonds and said coupons, and to the possession thereof and to the proceeds thereof is superior in law and in fact to any alleged claim of the said White-Phillips Company, Inc., and that, therefore, this defendant is entitled to be and to receive the said $160.00 due on said eight coupons of $20.00 each due on March 1, 1931, now in the hands of the complainant, the Treasurer of the State of Illinois.

And now having answered fully the above bill of complaint, this defendant prays the court that a decree may be entered directing and ordering the complainant, the Treasurer of the State of Illinois, to pay to this defendant the said sum of $160.00 due as aforesaid upon said eight coupons for $20.00

each, and that this defendant may be adjudged his costs in this proceeding.

RICHEY V. GRAHAM
Defendant,
By JAMES J. BARBOUR
Office 105 West Madison St.,
Chicago, Ill.

Springfield, Ill.
Solicitors for the Defendant
Richey V. Graham.

JAMES J. BARBOUR
DOYLE, SAMPSON & GIFFIN
Solicitors for the defendant
Richey V. Graham.

Filed June 18, 1931, R. G. Moore, Clerk.

June 1. 30 And Afterwards To-Wit on the 20th day of June, A. D. 1931, the same being one of the term days of the May Term, A. D. 1931, of the Sangamon County Circuit Court, the following proceedings were had and entered of record, to-wit:

* * (Caption) * *

This day come the parties hereto by their respective solicitors and this cause is now called for hearing upon the petition of The White-Phillips Company, Inc. for removal of this cause to the District Court of the United States for the Southern District of Illinois, Southern Division and the Court having heard the arguments of counsel thereon, takes this cause under advisement.

June 1. 31 And Afterwards To-Wit on the 22nd day of June, A. D. 1931, the same being one of the term days of the May Term, A. D. 1931, of the Sangamon County Circuit Court, the following proceedings were had and entered of record to-wit:

* * (Caption) * *

Upon motion of the defendant Richey V. Graham by his solicitor it is ordered by the Court that the rule to answer be and the same is extended to the 30th inst.

32 State of Illinois } ss.
Sangamon County }

I, R. G. Moore, Clerk of the Circuit Court within and for the County of Sangamon, in the State of Illinois, and keeper of the records and seal of said Court, do hereby certify that the foregoing is a true, perfect and complete Transcript of the record and proceedings now remaining in my office to this date, in a certain cause in said Court on the Chancery side thereof, wherein

* * (Caption) * *

as the same appears from the records and files of said Court in my office remaining.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Springfield, this 30th day of June, A. D. 1931.

R. G. Moore,
(Seal) *Clerk.*

Endorsed and filed July 2nd, 1931 S. T. Burnett, Clerk.

33 And afterwards, to wit: on the 24th day of September, A. D. 1931, there was filed in the office of the clerk of said court, a certain answer of the defendant The White-Phillips Company, Inc., which said answer was and is in the words and figures, following, to wit: Filed 193

34 (In the Circuit Court of Sangamon County)

* * (Caption) * *

THE ANSWER OF THE WHITE-PHILLIPS COMPANY, INC., TO THE BILL OF COMPLAINT OF THE COMPLAINANT.

This defendant, one of the two defendants in the above entitled cause, by William L. Patton, his solicitor, makes answer to the said Bill of Complaint, and prays that this answer may be held and taken also to be the interplea and statement of claim of this defendant, and answering and making claim says:

I.

That this defendant admits that the complainant is the Treasurer of the State of Illinois, duly elected and qualified and this defendant admits and states the fact to be that this Defendant has presented to the complainant as such Treasurer, for payment, coupons Nos. 2847 to 2849 and Nos. 18897 to 18901, inclusive, each for the sum of Twenty ($20.00) Dollars, due March 1, 1931, which said coupons represent the interest then due on Eight Illinois State Highway bonds so numbered and dated March 1, 1925, and each being in the amount of One Thousand ($1,000.00) Dollars and three of which said bonds will become due on March 1st, 1946 and the remaining five of which said bonds will become due on
35 March 1st, 1954, to which said bonds said several coupons had been previously attached, and this defendant says that the said bonds and coupons are all owned by this defendant.

And this defendant further answering states the fact to be that each and every of the said bonds were at all times and are now unregistered bonds.

II.

This defendant further answering admits that the defendant Richey V. Graham claims to be the owner of said bonds and coupons and has notified and ordered the said complainant to refuse payment of any and all of said coupons and any other coupons and the principal amount of any and all of the aforesaid bonds to this defendant or to any one on its behalf and admits that the said Richey V. Graham claims that the said bonds and coupons were stolen from him on or about the First of September 1930, and also claims that he is still the sole owner and entitled to the said coupons and the said bonds but this defendant further answering denies the claim of the said Richey V. Graham to ownership of the said coupons and bonds and asserts and states the fact to be that this defendant is the sole owner of the said bonds and coupons and the sole and only person to whom any payment of either coupons or bonds may lawfully be made by the said complainant.

III.

This defendant further answering admits that the complainant has always been and now is willing to pay the amount due on said coupons and bonds to whomsoever they may be lawfully paid and to whom complainant could pay the same in safety, and this defendant admits that the complainant does not in any respect, collude with either of the defendants, touching the matter in controversy, nor is he in any manner indemnified by the defendants or either of them, nor has he exhibited his Bill of Interpleader at the re-
36 quest of defendants or either of them, but has done so merely of his own free will and to avoid being molested, vexed and harassed touching the matters set forth in the said Bill of Complaint.

IV.

This defendant, further answering and setting up its statement of claim says:

That on September 16th, 1930, one J. A. Connolly a dealer in securities, having his place of business in St. Paul, Minnesota, by telegram, offered for sale to this defendant at its Chicago Branch office, eight (8) Illinois Highway Bonds, each in the principal sum of One Thousand Dollars, at the price of ninety-nine and one-half and accrued interest, which total price amounted to the sum of $7,975.12, which said price was a fair, proper, reasonable price for said bonds at the then market quotations for such bonds.

That said bonds, so denominated for brevity as "Illinois Highway Bonds", were issued under and by virtue of an Act of the General Assembly of the State of Illinois, entitled:

"An Act in relation to the construction by the State of Illinois, of durable hard surfaced roads upon public highways of the State along designated routes, and the provision of means for the payment of the cost thereof by an issue of bonds of the State of Illinois",

approved June 29th, 1923, in force July 1st, 1923.

That thereupon, upon September 17th, 1930, this defendant, by telegram to said J. A. Connolly at St. Paul, Minnesota, accepted said offer.

V.

That thereafter, on September 22nd, 1930, said bonds were received by Congress Trust and Savings Bank, at Chicago, Illinois, with a draft attached thereto drawn on this de-
37 fendant at Chicago, by said J. A. Connolly at St. Paul, Minnesota, in the sum of $7975.12 Dollars, and upon said draft being presented to this defendant at its Chicago Branch office for payment, this defendant paid the full amount of said draft, and the said bonds and attached coupons were then and there delivered to this defendant, and ever since said bonds and coupons have been and are now held and owned by this defendant.

VI.

Further answering, this defendant says that said bonds were and are payable to bearer, were not registered, nor was their negotiability or the free and unrestricted transfer of them in any wise limited, and the same at all times were and are now negotiable instruments and entitled to the legal status of such instruments.

VII.

Further answering, this defendant says that it is in the business of buying and selling and dealing in securities, having its principal office in Davenport, Iowa, but having a Branch office in the City of Chicago, Illinois, with a complete organization, and the right and power to buy and sell securities without consultation with or communication to the said principal office in Davenport, and that the usual, ordinary and customary mode of transaction of the business of buying securities at said Chicago Branch office was for the officers in charge of said Chicago Branch office to so deal without consultation with, communication to, or leave or direction from said principal office.

VIII.

That the offering of securities for sale by telegram and the acceptance of such offer by telegram, and the consummation of such sale by the seller forwarding the securities

38 with draft attached to a Chicago Bank, for collection of the purchase price and delivery of the securities, is, and was at the time of the transaction aforesaid, a usual, customary and ordinary mode of transaction of the business of buying and selling securities.

IX.

Further answering, this defendant says that it purchased said bonds and each of them for full value and paid full value therefor, and that at the time of said purchase from and payment of full value therefor to said J. A. Connolly, the said bonds were not, nor was any one of them, and the said coupons were not, nor was any one of them overdue, and this defendant took said bonds and coupons in good faith and for value and without any notice of any infirmity in the instrument or of any defect in the title of the said J. A. Connolly, and this defendant says that it became a holder in due course of said bonds and coupons, and now holds the same free from any defect of title of prior parties, and particularly free from any defect of title of the said J. A. Connolly.

Conclusion and Prayer.

And Now having fully answered said Bill of Complaint, and having set forth the statement of claim of this defendant to the said bonds and coupons, and the proceeds thereof, this defendant prays that a decree may be entered removing the cloud upon the title of this defendant to said bonds and coupons and the proceeds thereof created by the unfounded and illegal claims and assertions of title and demands of defendant Richey V. Graham, and quieting the title to said bonds and coupons and the proceeds thereof in this defendant, and enjoining and restraining the said Richey V. Graham from further claiming or asserting title thereto, or in any wise impugning or slandering the title of this defendant thereto

39 or interfering with this defendant in the ownership of said bonds and coupons and the right to the proceeds thereof.

And further that a decree may be entered herein decreeing and adjudging that the complainant shall pay to this defendant the sum of One Hundred and Sixty Dollars upon surrender of the coupons from said bonds due on March 1st, 1931, and that upon said payment by complainant he shall be ad-

judged and decreed to be discharged of and from all other and further liability as to said coupons due March 1st, 1931, and adjudging that this defendant shall recover its costs from said Richey V. Graham, and may this defendant have such other and further relief in the premises as equity may require.

THE WHITE-PHILLIPS COMPANY, INC.,
Defendant.
By WILLIAM L. PELTON,
Its Solicitor.

Filed September 24, 1931. S. T. Burnett, Clerk.

19. 40 And afterwards, to wit: on the 19th day of January, A. D. 1932, the following further proceedings were had in said court in said cause and were entered of record, to wit:

41 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

INTERLOCUTORY DECREE TO INTERPLEAD.

This cause now coming on to be heard upon the bill of interpleader filed herein, the answers of the defendants, and the replication thereto; and the Court having heard the arguments of counsel for the respective parties, upon consideration thereof, it is ordered, adjudged, and decreed that the said bill of interpleader is properly filed, and that the defendants do interplead and settle the matters in controversy in this suit between themselves; and for that purpose it is ordered, adjudged and decreed that it be referred to the Master in Chancery of this Court, to inquire and report which of the defendants is entitled to the coupons and bonds in controversy herein. And if the said Master shall be of opinion that either of the defendants is equitably entitled to share in the same, that he also ascertain and report what portion of such coupons and bonds belongs to each.

And it is further ordered that previous to the examination of any witnesses before the said Master, either of the parties may present to such Master, on oath, a written statement of his claim, and of the facts and circumstances on which it is

founded; which statement shall be answered on oath by
42 the other defendant, to the satisfaction of the said Master, and with the like effect as if such answer was filed to a bill of discovery; and upon such reference, either party is to be at liberty to summon witnesses and proceed before said Master in such manner as said Master shall direct; and that the solicitor of each defendant have notice of all proceedings before the said Master.

And it is further ordered, adjudged, and decreed, that the complainant be dismissed with his costs of this suit up to this time, to be taxed, to be paid out of the said fund in Court. And this Court reserves the consideration of all questions of costs as between the defendants, and all other questions and directions, until the coming in of the Master's report; but with liberty to either party to apply for other instructions or directions to the Master as may be necessary or proper, pending the reference.

Enter: January 19, 1932.

LOUIS FITZHENRY,
Judge.

Endorsed and filed January 19th, 1932. S. T. Burnett, Clerk.

64 And afterwards, to wit: on the 28th day of December, A. D. 1933, there was filed in the office of the clerk of said court, a certain statement of evidence (in narrative form) which said statement of evidence was and is in the words and figures, following, to wit: Staten Evid Dec.

65 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption)

STATEMENT OF EVIDENCE UNDER EQUITY RULE 75.

Be It Remembered that the above entitled equity cause came on regularly for trial before the above court sitting in equity, on the 28th day of October, 1933, upon the issues formed upon the order of the Court for The White-Phillips Company, Inc., and Richey V. Graham to interplead as prayed by the bill of complaint and upon the respective answers and statements of claim of said interpleader parties,

and upon the Report of the Master in Chancery to whom said cause had been referred, and upon the exceptions of The White-Phillips Company, Inc., to the Report of said Master in Chancery.

And James J. Barbour and W. Edgar Sampson appeared for Richey V. Graham, and William L. Patton and Winston, Strawn and Shaw appeared for The White-Phillips Company, Inc.

66 And the testimony of the several witnesses taken before said Master in Chancery and reported by him to the Court, and the exhibits produced before the said Master were read and considered by the Court; which testimony and which Exhibits were as follows, that is to say,

Case for, The White-Phillips Company, Inc.

BLAIR A. PHILLIPS for the White-Phillips Company, Inc. on direct examination testified as follows:

3 My home is in Davenport, Iowa. The White-Phillips Company, Inc. was incorporated in the State of Dela-
4 ware in 1929. The home office is in Davenport, Iowa, and it also has an office at One, North La Salle Street, Chicago.

The business of The White-Phillips Company, Inc., is the buying and selling of municipal and general market bonds. During the fiscal year 1930 our total volume of business was approximately $14,500,000.00 and the Chicago office is responsible for about half of the busi-
5 ness. In the Chicago office we conducted a general trading business in municipal bonds, buying and selling bonds over the counter.

The Davenport office took care of a great deal of our borrowing of money, which was necessary in the purchasing of bonds. The Chicago office in confirmation of our purchases out of Chicago would always give Davenport the total volume of business during the day in the Chicago office, as well as any banking which would affect the business of both our Chicago correspondents and our Davenport and various Iowa correspondents.

6 Being the active head of the organization, Davenport would many times call me up for exchange of ideas as

to the prices which we would pay for bonds and at which we would sell our bonds, and inasmuch as I divided
67 my time between Chicago and Davenport, it was necessary from time to time to be in touch with me by telephone, sometimes many times during the day. If an offering was made to the Chicago office and it was a case they were not quite clear on, it was submitted to me whether I was in Chicago or Davenport, but many times transactions are made both in Davenport and in Chicago without my O. K. unless they were undecided as to the price they would pay for the bonds.

7 If a block of bonds was brought into the Chicago office and the offering made and price agreed on between the owner and the Company in Chicago there would not be any consultation between Davenport and Chicago with respect to the purchase unless it affected bonds that would be saleable in the Iowa territory.

In September of 1930 the Chicago office was carrying on its business in the general way I have described. It was buying bonds and especially municipal bonds. That was our specialty and represented a great portion of our business.

8 I saw the paper marked W. P. Exhibit #1 at the time it was mailed into the Chicago office where it was received in the ordinary course of business there and was submitted to me. The bonds mentioned in that exhibit Illinois Highway 4's dated 3/1/25 due 3/1/54 and Illinois Highways dated 3/1/25 due 3/1/46 were the character of securities in which we were dealing.

(W. P. EXHIBIT #1 admitted in evidence).

At that time there was a publication in the nature
9 of a directory of security dealers known as the Security Dealers of North America and used as a directory of dealers by security dealers in the course of their business. We had a copy of the current volume of that book in our office (Book marked W. P. Exhibit #2). When
68 we got that inquiry from J. A. Connolly which is shown by Exhibit #1, I asked our trader in the office if they were listed in the Security Dealers of North America and he said they were. The listing that I spoke
10 of appears after the entry embraced in a red line on page 321 of that book.

Offer of page 321 and the first few pages of the book to indicate the character of the publication, including the

title page which reads among other things, "Security Dealers of North America, 1930 Edition, Herbert D. Seibert and Company".

(Book admitted as W. P. EXHIBIT #2).

In response to the letter identified as Exhibit #1, we
11 communicated with Mr. Connolly. W. P. Exhibit #3 is our manifold copy of a telegram sent to Mr. Connolly; it is a carbon copy of the original telegram we sent by the Western Union or Postal Telegraph Company. To the best of my knowledge this telegram was sent from our Chicago office to the telegraph office.

In due course we received an answer to this telegram
13 and W. P. Exhibit #4 is an answer to our telegram ad-
14 vising us whether the bonds are annual or semi-annual interest.

(W. P. EXHIBITS #3 AND #4 admitted in evidence).

The word "Retel" means re-telegram and is the word commonly used in the banking circles.

The paper marked W. P. Exhibit #5 is our firms bid
15 for the bonds, that is the price which we will unqualifiedly pay for the bonds.

(EXHIBIT #5 admitted in evidence over objection).

17 After sending Exhibit #5 to Mr. Connolly he wired us at the Chicago office confirming the sale of the bonds and as far as I know W. P. Exhibit #6 is his telegram which was placed in the files for our records.

(W. P. EXHIBIT #6 admitted in evidence over objection).

18 69 After the receipt by us of Exhibit #6 there was a further communication by telegram from our office to Mr. Connolly. The paper marked W. P. Exhibit #7 is the carbon duplicate of a telegram sent by us to the best of my knowledge.

(W. P. EXHIBIT #7 admitted in evidence over objection).

These telegram were sent under the direct supervision
19 of Mr. Ernest Bell who handles the detail of the office.

(W. P. EXHIBIT #8 admitted over objection).

There was a letter mailed to Mr. Connolly in confirmation of said telegram (Exhibit #8). I have not seen
21 the original letter since but there was a carbon manifold duplicate of that letter and that is W. P. Exhibit #9.

(W. P. EXHIBIT #9 offered in evidence over objection).

W. P. Exhibit #10 is confirmation by Connolly by
24 letter of the sale of the bonds to ourselves.

(W. P. EXHIBIT #10 admitted in evidence over objection).

The last thing I heard of the transaction was that the bonds were shipped to us for payment. I know that
25 they came into the Chicago office and that they were paid
26 for by a draft from our correspondent bank. I saw the draft after it was paid after this has come up. We would have the cancelled draft in our records.

The usual method of handling transactions of this
31 character was that upon presentation of bonds by the bank through which they were shipped in for payment, we pay for them by our Northern Trust check on presentation of such bonds.

This particular transaction was carried on by Mr. Bell. I was not there at the time they came in as I remember it. I might have been in the office but with so many of these transactions coming in from time to time they are not brought to my particular attention in the
32 usual routine of work. Very often bonds would be purchased by Mr. Bell or by our trader without consulting me individually.

70 At the time of the purchase of these bonds, I had no knowledge of the fact which subsequently devel-
33 oped that they had been stolen from Mr. Graham. So far as I know no knowledge or information had been given to the Chicago office of that fact; at least it was never brought to my attention.

In 1930, the responsible dealing officers or traders in the Chicago office were Mr. Bell and Mr. Schriefer. There was a stenographer named Miss Blackman, I believe. There were one or two salesmen that were out selling
34 but had nothing to do with the detail of the office, but I don't know what salesmen were there at that time and they had nothing to do with the purchase of the bonds.

I usually divided my time between the two offices, spending from Tuesday to either Thursday or Friday in Chicago, and the rest of the time in Davenport.

The usual course of business between the Chicago office and the Davenport office with reference to a transaction of this character is that as soon as the bonds are taken up they are shipped to Davenport for distribution
35 as to where we wish to borrow funds. We have to bor-

row money to handle our bonds. Many times for instance, if borrowing more in Chicago than we feel we ought to, we borrow in Davenport, Des Moines or some other section. These particular bonds were supposed to go to the Davenport office to be used as collateral there and they did go to the Davenport office; I saw them there at a later date.

36 I first saw the bonds in Davenport.

38 I learned that the bonds were stolen bonds as soon as Chicago shipped the bonds to Davenport and Ehlers, at Davenport checked up and called us and said that they had notice down at Davenport showing that certain numbers of Illinois bonds were stolen and among these 71 were the numbers. Up to that time I had no knowledge that these bonds had been stolen.

Those bonds are now in Davenport.

39 *Cross-Examination.*

I am 74 years of age on my next birthday and I have lived in Davenport since 1909. Prior to 1929 I was with The White-Phillips Company, a co-partnership. In September 1930, I was President of The White-Phillips Company. It has an office in Chicago and the head office is in Davenport.

In 1930 I was in Davenport about half my time. The 40 Chicago office is the sales and trading office. We used the public telephone between the two offices and sometimes many times during the day. Usually there were weeks at a stretch when I would be in the Chicago office from Tuesday until Friday and then occasionally a week I would not be there.

Approximately 27 people were employed in the Daven- 41 port office in August and September, and approximately five or six in the Chicago office. In the Davenport office we had a number of stenographers and had one stenographer in the Chicago office. These two offices corresponded back and forth from day to day and every day there was a letter showing transactions from both offices, a letter from Davenport to Chicago and also from Chicago to Davenport. These letters would show the transactions and business of each office insofar as it was considered advisable by the executives to advise the other office.

42 I recognize these documents that have been identified as having come from the files of the Davenport office.

72 The first time I saw page 321 of Exhibit #2, being the Security Dealers of North America book was when we were asked to bid on the bonds; one of the
43 questions I asked our trader at the time was if they were listed as authorized dealers. I made that inquiry in our Chicago office, and then I was shown the book.

The letter dated September 17, 1930 of which W. P. Exhibit #9 is a carbon copy was signed by Mr. A. H. Schriefer who was then the Assistant Secretary. Mr. Bell and Mr. Schriefer were both Assistant Secretaries handling that business in the office at that time.

Mr. Schriefer directed Mr. Connolly to ship the bonds to the Davenport office through the American Commercial and Savings Bank of Davenport because we were
44 borrowing most of our money there at that time and it was our intention to borrow money there and to have the bonds placed in the Davenport office and there purchase for the account of either office.

I know that the Chicago office paid for the bonds and they were immediately shipped to Davenport so we could borrow money on them. I know this from the records that have been shown me after I was advised that
45 the bonds were stolen. I am basing my testimony on the records and knowledge that came to me after I was told that the bonds were stolen.

Ehlers, the Assistant Secretary in the Davenport office is the person that advised me that the bonds were stolen. He called me on the telephone the day upon their receipt of the bonds from the Chicago office. He said: "Do you know those bonds we bought in Chicago are
46 the numbers of which we have a notice down here were stolen bonds?" I said: "That's news to me." And I asked him where it was from and he told me. Immediately upon his advising me of the fact I called the house that sent out the notice, apprising them of the fact
73 we had the stolen bonds; that house is the Foreman State Corporation, I believe.

Mr. Stutz is connected with the Davenport office as a buyer of municipal bonds. He is Secretary of the Company and his usual work is to go out direct to municipalities to enter into the transactions for the purchase of securities.

I do not know when the notice came to our Davenport office that these bonds were stolen but apparently that
47 office did receive that notice or they would not have called me that they were stolen bonds.

A great many bonds have come in and were purchased in the course of my work as a dealer in bonds. These bonds are not always accompanied by a draft. If they are out of town shipments they are many times accompanied by a draft. Sometimes they come in with just a bill by a correspondent bank asking us to pay for the bonds. Drafts are not drawn against them in all cases.
48 We have the photostatic copy of the draft accompanying these bonds and that is W. P. Exhibit #12. I first saw the original of this draft after I was apprised of the fact that the bonds were stolen and after its payment. The Transportation Bank of Chicago evidently gave it
49 to the National Bank of the Republic for collection; that is the usual custom in banking. The reason I looked into the book of the Security Dealers of North America was that I have never heard of the name of J. A. Connolly
50 before as a dealer. At that time there was nothing that caused me to look at this book for the name of J. A. Connolly except we buy from dealers all over the United States. Naturally when we bid on bonds we like to know if they are authorized dealers and look at the Security Dealers of North America to see if they are listed. I looked there for the name of Connolly because I had
51 never heard of that name before we received this let-
74 ter asking for a bid on bonds. I might have seen the name but had no transactions with him in any way and it never occurred to me to check him up until we were asked to bid on the bonds. I saw the book before we made the inquiry as to whether they were annual or semi-annual interest bonds. One of the Assistant Secretaries in the office said: "We have a letter from Connolly asking for a bid on the bonds". I said: "Who are they; are they listed in the Security Dealers of North America"? He obtained the Security Dealers of North America book and showed me the listing in the book, at which time I authorized him to go ahead and
52 make the inquiry, to make the bid on the bonds. In the last few years we have occasionally gotten notices that securities have been stolen. Mr. Ehlers at Davenport handles the notices at Davenport, and the notices that

come into Chicago are handled by our Assistant Secretary.

After we receive the notices sometimes they are put on file to refer to just as this was referred to. The notice goes to the Department in which those bids are being made, Mr. Ehlers at Davenport and the Assistant Secretaries in Chicago always have the notices that come into
53 Chicago. If a notice came to The White-Phillips Corporation at Davenport that securities had been stolen it usually goes to Mr. Ehlers and is filed away in Davenport. If notices come into Davenport usually they are filed or hung on a clip catch, and before bonds are paid for in Davenport the notices are referred to to see if any stolen bonds are reported, that we have any notice of any stolen bonds. The same is true in Chicago. Davenport and Chicago have never until this case happened, interchanged notices received from each office, as it was more likely we would receive such notice from Chicago than we would Davenport on account of being a larger city.

54 75 Prior to the purchase of these bonds we never attempted to advise each office of such notices. We sent these bonds from Chicago to Davenport because we had to borrow money on them in Davenport and we expected to pay for them in Davenport.

ROBERT ALEXANDER on direct examination for White-Phillips Company, Inc. testified as follows:

I have lived in Davenport, Iowa since 1904; have been in the bond business since 1915 previous to that I was Clerk for a wholesale grocer and before that I worked for John Deere Plow Company.

56 I am the Vice President and Treasurer and a stockholder in the White-Phillips Company, Inc. The principal office is at Davenport and it also has an office at One North La Salle Street, Chicago. Since the incorporation of the Company in February of 1929, I have been actively engaged in its business. Principally at Davenport. I am a salesman and work out doors.

57 Our principal business is buying and selling municipal bonds. We go to communities with projects to finance, assist them in their legal work, prepare the bonds and buy them when offered at competitive sale. Very fre-

quently we buy bonds from individuals and dealers and I think we are fairly well known as a market for odd lots of municipal bonds and bid on them where we have wires and requests from people to whom we have sold; also other sources, to bid on municipal bonds and we do so.

58 Our volume of sales for the whole year of 1930, ran about $14,000,000.00 and about half of that was done in Chicago.

76 I know by hearsay only, the general course of business in the Chicago office. I spend no time in the Chicago office. Assuming an offering of municipals is made to our Chicago office there would not be any communication between Chicago and Davenport before the transaction is carried through in Chicago. They bid in Chicago and if they buy the bonds Davenport hears about it afterwards. The Chicago office pays for the bonds which they buy on arrival in Chicago, usually through the Northern Trust, where we carry our bank account.

59 Usually in case of the purchase of bonds by the Chicago office and if the money were expended there would be a report from Chicago to the Davenport office as to the draft on the bank account. This would be the first the Davenport office would know of it. The books are kept in Davenport.

I did not know anything about the purchase by Chicago of the Illinois Highway Bonds here in controversy until I was told we had come in possession of some bonds that were stolen. I am not sure from what member of the institution I got it, but coming in from a week end I learned at Davenport that we had picked up some stolen bonds. I learned this from some of the boys in the office, Mr. Phillips or somebody about there.

60 With reference to notices from outside parties that bonds had been stolen, there never was any definite or prescribed method of handling them. In fact I don't know that much attention was ever paid to them until this occurred. Then we began to ask the boys what they do with these notices when they come in. It seems some of them were placed on the spindle hung on the end of the mailing desk, on which we open and seal our mail,—a tall desk and a nail or hook on the end with a clip on it. There were some notices of stolen bonds fastened on that clip. We don't know by whose authority but they were

put there; but there never was any policy established
61 77 how those notices were handled. I think the boys who handled the mail put them there.

After this incident occurred, my attention was directed to the fact that a notice of stolen bonds had been on this spindle. I did not see the notice of these bonds until I sent it to you. (Mr. Patton). The paper marked W. P. Exhibit #13 is the notice of stolen bonds to which I have
62 referred. I knew nothing about this until after the transaction was completed, until we had the bonds on hand in Davenport.

There was not any custom or practice in our Davenport office of advising the force or member of the force of the receipt of notices of this character. If one of these mimeographed or printed notices came in the mail to our Davenport office, I don't know what became of it; we found that one and one or two others hanging on this spindle but there was no established method of handling. And I know of no instructions or orders in our office with respect to communicating with anyone in authority the fact of the receipt of notices of this character. There were none at least on my part and so far as I am concerned, I don't know anything about it.

63 Prior to the disclosure to me by some one in the Davenport office of the fact that these bonds the Chicago office had purchased were stolen bonds, I had no knowledge of that fact nor had I any personal information in regard to the fact that they were stolen bonds.

I am familiar with the market prices of these highway
64 bonds in September of 1930. At that time, 99½ was a fair market price for these bonds. We aim to buy our bonds at what we call 1 and one-half points less than the selling price. If we can stretch it further than that we do, but one and one-half points is 1½% or $1.50 on $100.00. If we bought the bonds at 99½ we would have sold them to an individual purchaser at 101 and that is a fair price on the market.

78 After we received notice that the bonds were stolen I do not have any personal knowledge that anything was done from our Davenport office with reference to getting into communication with Mr. Connolly. I think our Davenport office telephoned Chicago that we had eight bonds that were stolen, according to the Foreman notice, and the Chicago office communicated with Foreman and

they communicated with Mr. Connolly. As to whether The White-Phillips Company, Inc., paid the sum of $7,975.12, all I know is what these records which you have there show. Mr. Ehlers, in the Davenport office, could tell about the receipt of the bonds and how he learned they were stolen.

Cross-Examination.

I was Vice-President and Treasurer. The main banking is done in Davenport. There is as much borrowing done in Chicago but the collateral is carried in Davenport, and trust receipts are issued against the collateral which are put in the hands of the Chicago bankers. If a purchase is made in Chicago by someone authorized to act for our Company, the securities purchased are then sent to Davenport and we arrange the borrowings on that security from Davenport. There may be some instances where some securities are carried in Chicago, but the majority are carried in Davenport. In this case if we were expecting to give these bonds as collateral a payment out of Chicago funds would be simply a temporary use of Chicago funds. In most instances the office in Davenport holds the collateral. The great majority of those securities are kept in the vaults of the Davenport Bank. When we get securities in Davenport which have been stolen and of which we have previously received a notice, the fact that they are stolen securities develops when the securities are compared with the notice. The reason it did not develop before was that the Agent making the transaction did not have the notice that was on file in the Davenport office.

I believe there was nothing on this file besides notices of bonds that had been stolen. I think there was this one notice and possibly one other at the time this thing came to light and I don't know what had been there previously. Mr. Ehlers' story as to how the notice got to his attention, is that he had the eight bonds mailed from Chicago on his desk, just received them, and under this notice over on that mailing list there is a pencil sharpener. Mr. Ehlers went to sharpen his pencil and while sharpening his pencil he observed the Illinois Highway bonds, and having eight on his desk he stopped to read the notice. That is when we learned we had eight

stolen bonds. Mr. Ehlers went over there to sharpen his pencil and saw that notice on top, that Illinois Highway notice was the one that was visible.

CARL STUTZ on direct examination for White-Phillips Company, Inc., testified as follows:

I have lived in Davenport, Iowa, my entire life and I am bond buyer for The White-Phillips Company and
70 was such in September of 1930. I have been with that Company since 1920. In the Davenport office in 1930 there were approximately ten office people excluding salesmen and road buyers and Mr. Phillips and myself and Mr. Alexander,—ten or twelve Mr. Phillips was President of the Company and spent several days a week in the Chicago office. Mr. Alexander spent practically his entire time selling in various parts of the country. In the Davenport office engaged in buying securities besides myself, I had two chaps working under me, three of us. Mr. Felder and Mr. Langfelt. I have not been connected with the Chicago office except in the capacity
72 of Secretary for The White-Phillips Company, but
80 I was not resident secretary. In the Davenport office with respect to any custom or practice with reference to communicating to the buyer force notices of stolen securities we have always assumed each office would receive a notice, therefore there was no notification made between Davenport and Chicago.

The custom was that such a notice, when it came in
73 was posted on the bulletin board with the rest of the stolen property list. I bought directly from municipalities and did not do office buying. We have our office buyer for bonds that come into the office, or in case a person or bond house should write a letter. I am on the road practically all the time buying from municipalities. I do not know what the office practice was with reference to people who did the buying in the office familiarizing themselves with these notices that came in.

74 Just prior to the time of this transaction that is from the 15th to the 27th of September, I was around buying in Illinois and I came into Chicago the day they found out in Chicago that the bonds were stolen. When I came in, the Chicago office had just received notification; that

75 is the first I heard of it. Up to that time I had known nothing about the purchase of these Highway bonds.

Up to that time I did not know of the fact of the receipt by the Davenport office of this paper which is marked W. P. Exhibit #13 because I don't think I was in the office from the time the notice came in. I had nothing personally to do with the purchase of these bonds here in dispute.

81 *Cross-Examination.*

In September of 1930 I was Secretary and bond-buyer for The White-Phillips Company elected by the Board of Directors. I put in very little time in the Davenport
76 office. Most of my time, except on Saturday, is spent out on the road. When I am in the office there I just attend to my own personal work, that is the work of the corporation. I meet customers and people coming to make inquiries of the concern there if they are brought in to me. I bought bonds for the Company and I had authority to buy a bond if presented from a responsible
77 dealer, if in my judgment it was proper to buy it.

The only way we can inform ourselves that a bond has been stolen is through the capacity of Our Dealers Secity. If the dealer is listed in the Security book as being a legitimate dealer, or a customer we known as a client, or an individual that comes in, that is the only way we can familiarize ourselves with that. That book is supposed to give only licensed dealers. A licensed dealer would not be a thief or doing anything wrong if the Security Commission of the State is working properly. That is all I look at as a buyer for my concern to
78 find out whether I was dealing with a reputable party and buying a safe security. When in the office I usually looked at the list of stolen securities as to whether securities were stoken or not, but as far as memorizing them, it is impossible. There was nobody in the Davenport office whose business it was to refer to the information that came in as to what was stolen; and this transaction was handled in Chicago. Unless the bond was purchased from a man not listed in the guide or from a person they did not know, those in the Davenport office
79 would not try and familiarize themselves and go over this list to see if the bonds were listed. The book and

the notices on the hook would amount to nothing
82 unless there was something that would arouse suspicion about the person offering the security. The notices were kept on the hook because we try and keep a list of all stolen securities that come into the office. We always file them; in our front office we have a sort of glass cage, there is a clip on the top and these securities are fastened on the clip. It was the duty of the office boy, on opening the mail, to look after the clip. The
80 office boy would open the mail, see the notification and put it on the clip. That is all I know. I know very little of the office system—the interior workings.

ROY CROWE for The White-Phillips Company on direct examination testified as follows:

81 I live at Davenport, Iowa, and I am a stenographer employed by White-Phillips Company, and was so employed in 1930.

I have no duties with reference to the coming in of mail from the Chicago office unless directed to me, unless Mr. Ehlers is out, and then I will look after it. I have no recollection about the time that this paper came into the office.

82 In the Davenport office if notices came in from various places that bonds had been stolen the notices were put on a clip on the glass around there. There was no custom or practice of circularizing that notice among the persons in the office, and there was no duty or custom on the part of anybody in the office of familiarizing themselves with these notices. These notices would be put on that hook by the boys that opened the mail. There was not
83 any custom or practice of communicating such notices to Chicago.

Cross-Examination.

I did not have anything to do with opening the mail. I would learn about notices of stolen securities being on the hook as I would pass by. Also I would be around when they opened the mail and they would put them
83 up. Offerman and Drumm usually opened the mail.
84 I have opened the mail myself and got notices of stolen securities and put them on that clip. There was

a clip in the office where notices could be found giving a description of the securities that were out and stolen. The boy would put them there, but others in the office were not notified that they were put there. But they were there for the purpose of people connected with the Company looking at them.

ARNO SCHRIEFER for The White-Phillips Company on direct examination testified as follows:

86 I live in Davenport and my business is investment banking with The White-Phillips Company, Inc. I have been employed by them five and a half years and in September of 1930 I was in the Chicago office doing the legal work of the firm and helping out in the office duties. I was there at the time of this Connolly bond transaction and was in on it all and I believe I wrote the confirmation of the purchase. I saw the telegrams which came
87 in and I heard at least the telegrams that went out. I saw the paper marked W. P. Exhibit #1 when it came in. It came in the usual course of business to the Chicago office of The White-Phillips Company, Inc. It is the character of communication which would have come through my hands in the usual course of business.

Besides myself in the office that would have received or acted upon such a communication was Mr. Ernest Bell. I cannot be quite certain whether that passed through
88 my hands or not but it no doubt did. I am quite sure I saw Exhibit #3 the same day it was sent to Mr. Con-
89 nolly and I have an independent recollection of this Connolly transaction. After looking over these papers and refrshing my recollection from them I remember that something came in, evidently this letter from Mr. Connolly, Exhibit #1, and that in the usual course of
84 business I probably looked over the mail that morning as I always did and this particular letter went to
90 Mr. Bell and we did not know Mr. Connolly—had not heard of him and looked it up in the Security Dealers directory and found he was listed. Mr. Bell asked Mr. Phillips what price he would care to bid and Mr. Phillips first gets an idea of the exact market quoted by Foreman Trust Company, Bond Department, and asked what they would give us for the bonds and Mr. Bell would send up this wire asking whether or not they were annual or

semi-annual interest; we got the wire back and from that we could get our prices because there are two different prices on semi-annual or annual interest bonds, and we check up our price and we got a wire back saying that that price was agreeable and we wired we would take the bonds, and then I wrote the confirmation of the purchase and the bonds came down to the Chicago office instead of being sent to the Davenport office as directed. They came through the National Republic Banking Company, I believe, some of the smaller banks, I don't re-
91 member the name and we took up the bonds. The bonds were delivered to our Chicago office and we turned over the check, a photostatic copy of which is marked Exhibit #10 in exchange for the bonds.

I made the payment or saw the payment made. I saw the bonds come in but I don't remember seeing this draft (exhibit #12). I do know that the bonds were left with me and a check on the Northern Trust Company was given in payment of the bonds.

At that time I had no knowledge, notice or information of the fact that these bonds had been stolen. There had not at that time come into the Chicago office any notification from anyone that bonds included in this series had been stolen.

The first information we got of the fact that the bonds had been stolen was when we received a telephone
85 call from our Davenport office the day that the bonds reached there, saying that they were the numbers shown on a notice that they had of stolen bonds.

We sent the bonds from Chicago to Davenport because Davenport is our home office and all transactions, that is financial matters are taken care of and governed by what our Davenport office says.

When Mr. Phillips was in our Chicago office there was no custom or practice in the Chicago office before buying offerings of bonds with respect to communicating with Davenport to get leave or authority to buy the bonds. There was no communication that I know with the Davenport office by the Chicago office before these Connolly bonds were bought by the Chicago office. If there had been such a communication the person in Chicago who
94 would have communicated with Davenport was Mr. Bell. After I received notice from Davenport that they had learned that these bonds were among the list of stolen

bonds, the Chicago office immediately called Foreman, the Bonding Department, and told them that we had
95 bought and paid for the bonds. After that I know Mr. Phillips called Mr. Connolly and told him that they were stolen bonds. A day or two after the telephone conversation, we received in the Chicago office a telegram from Mr. Connolly and Exhibit #14 is that telegram—that is September 25, 1930 and it must have been Friday.
97 The bonds went to Davenport and immediately or very soon after they got there, there was a telegram from Davenport to Chicago telling us the bonds had been stolen. Then we called the Foreman people from whom the notices of the theft had emanated and told them we had bought the bonds. Then there was a telephone conversation between Mr. Phillips and Mr. Connolly in an endeavor to get Mr. Connolly to take back the bonds because they were stolen and this la[illegible] telegram is Mr. Connolly's refused so to do.

86 *Cross-Examination.*

98 I wrote the letter dated September 17th of which W. P. Exhibit #9 is a carbon. That was written to Mr. Connolly directing him to send the bonds to Davenport. The general course of business was that blocks of securities of any size usually went to Davenport, and 100 or 200 or more amounts were usually taken up at our Chicago office. When I wrote that letter I represented The White-Phillips Company. It was not the expectation of
99 the concern that the bonds would be presented at the Chicago office. No attempt was made at the Chicago office by looking up records or anything else to find out whether those bonds were stolen or have information at hand when the bonds should be presented to check up on them. We did not expect to have the bonds presented to our office.

I had been working around the Chicago office about seven months. That office is located at 39 South LaSalle
100 in the New York Life Building. It has two windows. Is about 18 feet wide and had partitions in it. I had two offices and an outer office. Two people were employed there at that time, who handled the mail when it came in each day—Mr. Bell and myself.

We might have received notice that securities had been

stolen. When such notices came in we put them in a file and we had a separate file for notices of securities that
101 had been stolen came to our office. I saw such a file. It was kept in the very front of the top drawer of the filing cabinet we had there. I have seen four or five notices there at one time. The last time I looked in there was sometime probably in December of 1931. That file was started before I went into the Chicago office, which was in February of 1930, and I probably saw it a short time after I was in there. I saw the bonds when they came
87 in. I believe the messenger went out to the office and took a receipt for the bonds.

102 When these bonds were presented I did not make any effort to find out whether they were stolen when I purchased them and I don't remember seeing Mr. Bell do it. Do not know of anybody looking at the files at the notice of stolen bonds at the time those bonds were taken in. I was not relying on anything myself—it was not my end of the duties when Mr. Bell was in the office to take
103 up bonds—to pay for bonds. I knew of the book having been opened and I know we looked up the name of Mr. Connolly in the book. We did this because we had not heard of Connolly and we usually like to know with whom we are dealing before we enter into a transaction. This for the purpose of knowing whether or not it is all in the open when we intend to buy or sell, that is whether it is a legitimate transaction, open and above board. After we saw his name in the Security book we considered it a
104 legitimate transaction and all in the open and above board. There was no reference or search made of our memorandum to see whether the bonds were stolen or not that I know of.

VERNON EHLERS, for The White-Phillips Company on direct examination testified as follows:

I am thirty years of age and I have lived in Davenport
108 all my life. I have been employed with The White-Phillips Company, Inc., for fourteen years; was a stenographer for about five years. And now I have general supervision of the office. I handle all banking, all con-
5 firmations to customers, all correspondence with salesmen, etc., and those were my general duties in 1930.

The office of The White-Phillips Company, Inc., in Davenport covers about one-third of the fifth floor at the rear end of the building. As you come in to the office there is a little waiting room with a bench, a cashier's
88 cage and a work room is right off of that entrance. It is all in one back room about 50 feet square and
109 private offices around two sides. That back room is not divided up by partitions or anything of that kind but there are desks all over that main office and the situation was the same in 1930 as it is now. My desk was on the southwest corner of the office, the farthest point away from the customer's desk. The customer's desk is the counter where the customers come in and deal. I referred to it as our cashier's cage.

In September of 1930, excluding the officers, there were
110 about 10 or 12 people employed in the Davenport office, including salesmen, who worked out of the office. I am in charge of the office force and of the general activities of the office.

At that time another office of The White-Phillips Company was located in Chicago.

In a general way the business of The White-Phillips Company was the purchase and sale of high grade municipal bonds.

The offerings of bonds to Chicago would usually be either by personal representative of some local house or
111 by wire or mail or telephone. Sometimes there was consultation by wire, correspondence or otherwise between the Chicago office and the Davenport office in regard to the purchase of bonds before the purchase was effected, but this did not occur all the time. If Davenport was particularly interested in the block of bonds they might call Davenport. It depended to a great extent whether Mr. Phillips was in the Chicago office; his word meant everything.

If bonds were bought in Chicago for our Iowa market we would probably not know about it until the next day when we got information that they bought them. If a substantial block, and a block Mr. Phillips knew the Davenport office had customers in the market for, they
89 would telephone or wire us. There was not any necessity for the confirmation by the Davenport office
112 of purchases made by the Chicago office in the ordinary course of business. It was then general course of busi-

ness for Chicago to purchase offerings without consultation with Davenport.

I have seen the block of $8,000.00 of Illinois Highway bonds. They came into our office from the Chicago office and those bonds are now in Davenport and are up as collateral. These bonds were unregistered.

We were not in a position to send down the actual bonds for submission in evidence. I got these bonds out of collateral for a day, called up a friend of mine in the business of making photostats, gave him the bonds, and he took them to his place of business, had the photostats
113 made (Exhibits 15-A, 15-B, 15-C, 15-D, 15-E, 15-F, 15-G and 15-H) and brought them back with the bonds the same day. These photostats are true and correct photostatic copies of the actual bonds we received from the Chicago office with the exception we did not copy the interest coupons; in every other respect they are the same.

114 The paper marked W. P. Exhibit #18 from White-Phillips Company, Inc., Chicago, signed in typewriting "Ernie" is a letter I received in the genearal course of business at Davenport from Mr. Bell of the Chicago office. It was received September 23, 1930, mailed on September 22nd. I think that was the first that the Davenport office knew of the purchase of these Illinois Highway Bonds,
115 but I could not swear to that. These bonds were received at the Davenport office contemporaneously with the letter, but in a separate package. Could not identify these specific bonds other than the fact that there were $8,000.00 of Highway bonds.

The general and customary routine of the Daven-
90 port office with reference to the receipt of mail was that the first thing in the morning Mr. Offerman would go to the Post Office, bring back the mail and open it. He would first take the mail to a desk alongside of our
116 cashier's cage, about 40 feet from my desk. Then Mr. Offerman assisted by Mr. Drumm, opened the mail. First they would sort out all the personal mail which of course, was not opened, and lay it on the desks of the respective parties to which it was addressed. They would then sort out the other mail to the various departments for which it was intended, Collection Department, Buying Department or Sales Department.

The clip or hook referred to here is a little clip fastened

117 to the top of the cashier's cage. The sides of that cage are glass and the hook was fastened over the top of the glass right above the desk where the mail was opened. It is my knowledge no instructions had been give to Offerman or Drumm or anyone else in the office with reference to stolen bond notices. If there had been any such instructions I think I would have known it. The way I learned that these bonds were stolen bonds was this. They were received on September 23rd, and put on my desk, During the course of my morning's work I walked over to sharpen a pencil, the pencil sharpener being right beneath this glass where this hook was. I was standing there sharpening the pencil, turning the handle, and I happened to look up and saw "State of Illinois bonds
118 stolen" on a notice on that hook; having received these bonds on my desk I compared the numbers and found they were included in the list. There was no duty in the Davenport office with reference to anyone familiarizing himself or herself with the contents of that clip or hook. It was purely accidental that I detected this notice. I was sharpening the pencil and looked up and saw those words under my eyes "Stolen Illinois Highway Bonds". I then immediately telephoned to the Chicago office and informed them what I found out. The bonds were
91 then on my desk and insofar as I know had been paid for by the Chicago office.

In the Davenport office there was no custom or routine with reference to the handling of stolen bond notices.

120 It would be impossible for any bond house to keep any accurate record as to stolen bond notices on account of the volume of them and the fact you might have to keep a record from ten to twenty years past. One bond may have been stolen and it would be impossible to check back on every bond bought. If it was customary or possible for any bonding house to keep such a record they would not be able to deal in over the counter bonds at all, would not be safe in buying a bond unless they went to a municipality and under-wrote it themselves. I could not say how many such notices came to our office, but every so
121 often a notice of such type would come through. Some of them would be ten or twelve legal sized sheets in fine print listing bonds, numbers, coupons and all sorts of securities. I recall the list that was mailed out in connection with the robbery of a bank at Lincoln, Nebraska.

It was very voluminous; don't remember the date of that
122 but it was one of the large lists that came into the office.
W. P. Exhibit #13 is the notice I took off the clip on that occasion; it has been referred to in the testimony as a hook. When I discovered that these bonds on my desk were the subject of this notice I telephoned the Chicago office and talked to Mr. Bell.

Cross-Examination.

123 The boys get there at the opening of business at eight o'clock and I get there at eight; registered mail comes in a little later than ordinary mail—around nine o'clock. I did not receive a telegram the day before that those
124 bonds had been purchased. Could not give the time
92 when I went to get my pencil sharpened but at that time the bonds were on my desk and the envelope had been opened; the boys take them out of the envelope when they are received from the Post Office.

This clip was hanging on a glass partition on the outside of the cashier's cage. On that clip the boys put any miscellaneous notices of any sort; most any ordinary junk that came into the office was hung on that hook. I
125 have seen traffic posters and warnings—most anything might be on that hook. It was a clip for what junk came into the office and the boys opening the mail did not call it to the attention of anybody. Could not say how long it stayed there. I imagine when it got full it was taken off and destroyed. I simply saw this notice by accident because I happened to be sharpening a pencil.

In my opinion it was impossible to keep track of notifications of stolen bonds. My firm is not doing that now and have no place to keep any of that. They have not
126 changed their system at all. I this I am referring to the Davenport office, that is the only office I work in. In the Chicago office they don't make a record of such notices but they do file the list, I understand. They don't make a habit of checking over that list whenever they buy a bond. Probably they could do this by hiring several more employees to take care of that, and then they would not be sure they had a record of all stolen bonds. It is possible to hire an employee to keep track of the notifications of bonds stolen and check that list before purchases are made, but I don't believe one employee could do it if

127 they intended to keep any accurate record. In my opinion the difficulty and expense of keeping track of the notifications of stolen property would make it impracticable to investigate and find out whether we had been notified that a bond had been stolen before we bought it.

93 I have been in the business fourteen years. Any records they might have would not be anywhere near complete. In my opinion it would be as impossible to do that as it would be to check every $10.00 or $20.00 bill handled in the Lindberg case. You probably have seen the list, it would be impossible to check every one of
128 them. In my opinion such notifications are useless. I do not think that firms that buy stolen property after they have been notified of it having been stolen should be held to account for buying stolen property. In using the word "memorizing" I mean employees carrying in mind a recollection of any literature concerning a particular bond issue, a portion of which had been stolen.

The paper marked Graham Exhibit #1, 8-12-32 which is a yellow sheet with typewriting and some pencil and ink notations on it, was written out of our office and is in my handwriting. Could not say when it was written but it was some time after we saw the notice in the clip and I rather believe it was written at the time we sent Mr. Stutz to St. Paul. It was made up in our office. The words "read this" in pencil looks like Mr. Stutz's handwriting, but I could not say when he put it on there. The word "Carl" written in ink means Carl Stutz and I wrote that.

130 The Union Savings Bank and Trust Company at Davenport holds these bonds as collateral. I could not say when they were turned over to that bank without looking at the record; I turned them over. I put these bonds up as collateral with this bank after I learned that these bonds were stolen, and after I notified the Chicago office that the bonds were stolen bonds. I did not have any direction to do that, it is a part of my daily duties to handle the finances. I could not say the amount of the loan for which these bonds were put up as collateral; it was part of a larger loan, there were other bonds in the same loan.

131 94 I did not inform the bank that these bonds were stolen bonds when I placed them as collateral nor did

I notify the bank that our Mr. Phillips had notified the Foreman State Corporation on the morning I telephoned to Chicago that these stolen bonds had turned up in our possession.

I believe these bonds have been held as collateral ever
132 since; they have never left Davenport. At times we have owed that bank about $300,000.00.

I have been connected with that office for fourteen
134 years. In the usual course of business mail deposited in the Post Office in Chicago would arrive at our office in Davenport the following morning, except over the week-end. Our office is in the First National Bank Building. Don't know of any Temple Building in Davenport, unless it is the Masonic Temple Building. The notation on White-Phillips Exhibit #13 in pencil "501 Temple Building" looks like it might be Mr. Stutz' writing. I think Mr. Stutz conferred with Mr. Roach, in Chicago, at sometime or another regarding this case. His office is located at 501 Temple Building, Chicago, that being the office of the States Attorney there. Mr. Stutz probably got the address and put it on there because he had that paper in his pocket.

ERNEST BELL for The White-Phillips Company on direct examination testified as follows:

135 I have lived in Chicago since July of 1930 and before that I lived in Davenport, Iowa. I am 25 years of age. I was connected with the Bettendorf Company, manufacturers of freight cars for some eleven years and then made a transfer to The White-Phillips Company in the Davenport office in October 1927. Began there as a
136 stenographer and remained as a stenographer for about two years and then later on I took over some clerical duties.

95 I went to Chicago in the employ of The White-Phillips Company in July of 1930 as Assistant Secretary. My duties in Chicago were to take care of office
137 correspondence, paying for bonds we bought, and delivering bonds we sold. In the case of purchasing a substantial block of bonds we discussed with Mr. Phillips as to the price we should pay for them. If we were not buying the bonds from anyone with whom we had done business

in the past we would look it up in a publication we received. W. P. Exhibit #2 is that publication.

I negotiated the major portion of the transaction with J. A. Connolly of St. Paul, Minnesota which resulted in the purchase of $8,000.00 of Illinois Highway 4's.

Exhibit #1, being a communication dated September 13, 1930, addressed to The White-Phillips Company at Chicago, signed J. A. Connolly, the subject matter of which is asking for a bid on five thousand Highway 4's
138 and three thousand Highway 4's was received by me on September 16th.

I dictated the telegram addressed to Mr. Connolly of which Exhibit #3 appears to be a carbon copy. On September 16, 1930 I received Exhibit #4, being a telegram addressed to White-Phillips Company at Chicago signed J. A. Connolly, with the stamp of the White-Phillips Company. I personally wrote Exhibit #5, which is a carbon copy of the telegram dated September 16, to J. A. Connolly signed White-Phillips Company, Inc.

I received Exhibit #6 being a telegram to White-Phillips Company, Chicago from J. A. Connolly.

139 I saw Exhibit #7, which is a carbon copy, but I did not dictate it; it was dictated by Mr. Schriefer in our office. I saw the original before it was transmitted over the wire. I received Exhibit #8, being a telegram to White-Phillips Company dated September 17th, signed by J. A. Connolly. Exhibit #9, being a carbon copy of a letter addressed to J. A. Connolly signed White-Phillips
96 Company, Inc. by blank, Assistant Secretary, was signed by Mr. Schriefer; I read it and saw the original.

140 I have seen Exhibit #10, being a letter dated St. Paul, Minnesota, September 17, 1930, signed in a printed signature by pen written initials, J. A. Connolly. W. P. Exhibit #11-B is an original check, dated September 22, 1930, drawn by The White-Phillips Company, Inc., by E. E. Bell, Assistant Secretary, and Exhibit #11 is a photostatic copy; that is my signature.

W. P. Exhibit #12-A is an original draft by Mr. Connolly to the order of the Transportation Bank of Chicago drawn on White-Phillips Company of which Exhibit #12 is a photostatic copy. That is the original draft delivered with the bonds.

141 After the receipt of the original letter marked Ex-

hibit #1, which I probably received, and since the bonds were the type of securities in which we were dealing and we were interested in them, but not knowing whether J. A. Connolly was a recognized dealer or what his standing was, the only manner we had of checking it up, which we utilized, is this publication I have identified. The entry on page 321 of that publication in large black type "Connolly, J. A. Guardian Building, Miscellaneous Securities", Corporation Finances, phone Garfield 2118" is the entry to which I looked in order to satisfy myself he was a dealer. If a dealer is published in that book we consider him a recognized dealer. That is the only means of identification that I know of.

143 As to how it occurred that while the draft was drawn to the order of the Transportation Bank of Chicago, the check was drawn to the order of the National Bank of the Republic the explanation is that. The bonds and the draft were delivered to me personally for examination. I recognized the messenger who brought the bonds 97 and the draft as being from the National Bank of the Republic, and without any further investigation of the draft, after the bonds were examined to see that they had the proper coupons attached and were signed and sealed, I drew a check on the National Bank of the Republic, thinking that this messenger was from that bank. When he came in after the check, the messenger recognized it was made out to the incorrect bank, but since the check had been certified he took it to the National Bank of the Republic and had it endorsed over to the Transportation Bank. The check was certified by the Northern Trust Company on the same day the bonds were delivered and the amount thereof in the sum of $7,975.12 was charged against the account of The White-Phillips Company Inc.

144 We never got that money back, but after discovering that the bonds were stolen, we made an effort to get Mr. Connolly to take the bonds back. I remember receiving W. P. Exhibit #4, being a telegram dated September 25, 1930, addressed to White-Phillips Company, Inc., signed J. A. Connolly and which reads "Regarding Wednesday telephone conversation, sorry but for the present must decline to repurchase Illinois Highway 4's". Connolly also had a telephone conversation with Mr. Blair Phillips, President of the Company, which I heard

145 and wherein Mr. Phillips was trying to get Mr. Connolly to take the bonds back. Connolly never would take the bonds back and later he died.

After receiving the bonds from the bank messenger and paying for them they were sent to our office in Davenport, Iowa, and they were originally intending to have bonds delivered to Davenport direct from St. Paul, but they came into Chicago; we took them up and transmitted them to the Davenport office by registered mail.

146 Those bonds were transmitted by me to Davenport in the late afternoon of September 22, 1930. I per-
98 sonally wrote W. P. Exhibit #16; it was not dictated. That is the letter of notification to Davenport of the purchase of these Illinois Highway bonds without detail, numbers, etc., just saying we bought so many bonds. There had been no previous notification from the Chicago office to Davenport of the fact of the offer of the bonds or the purchase of the bonds. Mr. Phillips was in our Chicago office and it was not necessary to go to Davenport. So far as I was concerned, when the bonds were received and a certified check was delivered, the transaction was closed with the exception of sending the bonds to Davenport; that is my last duty in connection with the transaction. At the time we purchased these bonds and received them, and delivered the check, I had no knowledge whatever that they were stolen.

147 I learned that they were stolen, by phone call from Mr. Ehlers of Davenport in the afternoon of September 23, 1930.

At that time, Blair Phillips, President, spent the larger portion of his time in Chicago. There were also in the Chicago office Mr. Schriefer and myself as Assistant Secretaries, two young ladies, alternating as stenographer, one day and the next, and one salesman, an outside man whose activities were entirely outside of the office. That was the office force.

148 In the course of my experience in handling the bond business and in charge of the Chicago office, we received from time to time printed notices from the various detective agencies which contained bonds listed on the New York Exchange and Liberty bonds in which we do not deal and they were put in a folder we have in the files as a matter of form. Nothing is destroyed in our

Chicago office. Immediately after we received notice from Davenport that these were stolen bonds, and on going through our file to see of there was any notification from anybody, we did not find this notice; there were several of the notices which I have received, but not
99 the notice covering these particular bonds. So far
149 as I know no such notice was ever received by the Chicago office. We have an empty file drawer for papers not pertaining to our general course of business, that is papers that are not with our customers, but various advertisements, bond offerings to which we are not likely to refer, are laid flat, not filed in any order, but it is not our practice to throw away papers in the Chicago office. Everything is preserved. After a thorough search of every paper in the drawer this Foreman notice was not found. We looked in every place where such a notice in the ordinary course of business would be placed if received. I have no recollection of ever having received such a notice prior to the purchase of the bonds. These were unregistered bonds. At that time or previous
150 thereto in the Chicago office there was not any custom of searching through the file of notices of stolen bonds before purchasing offerings. As a practical matter in the course of the bond business it would not be possible as a business practice to investigate the notices of stolen bonds before making a purchase.

Cross-Examination.

155 The copy of the attorneys' opinion approving the bond issue referred to in Exhibit #12, being the letter I wrote on September 22, is not with the letter. I do not remember from what attorney the opinion came but it was the attorney engaged by the house bringing out the issue; it is not necessary to investigate that when you buy bonds. Municipal bonds without an attorney's opinion are not good delivery. The opinion in this case accompanied the bonds. Municipal bonds are not paid for
156 unless the opinion is with them. In a few cases not so well known as Illinois Highway bonds, if the opinion is not with the bonds we obtain a copy from other
100 houses on the street, but payment is in no case made unless the opinion is with them, and this opinion merely approves the legal procedure when the bonds are

brought out. I cannot swear that I saw an attorney's opinion but I know one was issued before I paid for the bonds, because it is investigated if we don't have it on hand. I have no distinct recollection of seeing an opinion with reference to these highway bonds. The usual custom is that the attorney's opinion comes with the
157 bonds when they are presented, but my recollection is not absolutely clear in this case. I have been in the bond business since October 1927. In the course of my employment if I happen to read in the daily papers of persons accused of being receivers of stolen bonds I probably would remember it. I have no knowledge whatever as to this man Connolly except when a letter came in asking for a bid for the bonds. That is the first I heard of him. I have since ascertained that he was convicted for transporting stolen bonds in the mails and died in prison.

At 39 South La Salle street, being the place where we were operating on the occasion of the purchase of the
158 bonds, White-Phillips Company had a two windowed office and four employees were there. At that office we have received notices of securities having been stolen and those notices are in a nature of a warning not to
159 purchase the stolen securities. All notices I ever received in the Chicago office covered bonds not dealt in by us and did not contain municipal bonds. I never received a notice with reference to municipal bonds. We do not handle coupons in our office. When notices came into our office we put them in the drawer with the other miscellaneous matter and disregard those notices. It would be possible to keep a list of stolen securities that come to our office to be consulted by a person making purchases of the bonds.

101 We received the first communication for a bid from Connolly on the 16th of September and we made the purchase on the 16th or 17th. We paid for the bonds on the 22nd. of September but bought them prior to that. We agreed to buy the bonds when presented if satisfactory when we examined them. In the five days that intervened from the 16th of September to the 22nd. of September, I did not make any inquiries or investigations to ascertain whether these were stolen
161 bonds, nor did any of my co-employees make any such investigation. I had no knowledge who Mr. Connolly was except his name appearing in the book.

It is the custom of the trade to look at that book and

judge our purchases by ascertaining whether the man is listed. This is the only publication I personally know of that contains the list of all recognized dealers in the United States. It was the custom of our office to consult that list and that was the criterion whether we would purchase.

I have had experience in our Davenport office, with the same firm, as to bonds and also in connection with my
162 delivery to the other bond houses in Chicago. The people we make delivery to are recognized and don't need to look up their name in the book. I merely deliver the bonds. They examine them and render us a check in payment. That is all I had in mind as a basis to the answers to these questions.

163 I know the Foreman State Corporation, but I have never seen any notifications coming from the Foreman State Corporation with respect to stolen securities. No-
164 tices as to securities having been stolen would come in after they are sent out to us but not with great frequency; they would come very rarely and not at all on municipal bonds, but I don't know any reason why notification would not come to our Chicago office of municipal bonds having been stolen.

102 Our general office was in Davenport and has been there in excess of fifteen years.

I never received a communication of the general nature of Graham Ex. #2, the same being a circular of the Illinois Bankers Association, Protective Department, dated September 5, 1930, giving a list of bonds or securities purporting to have been stolen, and our Chicago office never received any bulletins of that nature to my knowledge.

On September 23, 1930, we received a notification from Davenport that these bonds had been stolen, and advising us that the notice was received from the Foreman State Corporation. On the same afternoon Blair Phillips, by telephone carried information to the Foreman State Corporation that we had the stolen bonds.

166 *Redirect Examination.*

Before we received the bonds from Mr. Connolly we had information that the bonds were of the par value of $8,000.00, the number that were due every year, the cou-

pon rate, and that they were State of Illinois Highway Bonds with semi-annual interest coupons. We had no information of the numbers or date of issue until we received the bonds.

(Stipulation dated May 17, 1932, signed James J. Barbour agreeing that the following letter may be read in evidence):—

"Congress Trust & Savings Bank
Congress Bank Building
Chicago January 22, 1931.

Mr. Robert E. Manley,
Acting United States Attorney,
New York, N. Y.

Dear Sir:—

103 We are requested by White-Phillips Company, Inc., of this City to advise you with reference to a transaction covering $5,000. Par Value State of Illinois Highway 4% Bonds due 3-1-54, and $3,000. of the same bonds due 3-1-46, which occurred in September 1930.

The records of this bank show that these bonds were received by us from J. A. Connolly of St. Paul, Minnesota, for collection and remittance to the Liberty State Bank of St. Paul. These bonds were billed to White-Phillips Company, Inc., in the amount of $7,975.12 and were received by us on September 22, 1930.

We received in payment for these bonds from White-Phillips Company their certified check No. 170 dated September 22, 1930, in the amount of $7,975.12, and we remitted to the Liberty State Bank of St. Paul for the account of J. A. Connolly by Western Union Telegraph the sum of $7,967.15. This remittance was covered by our Cashier's check No. 58377 and was payable to the Western Union Telegraph Company.

The difference between the amount at which these bonds were billed to White-Phillips Company and the amount of our remittance to the Liberty State Bank, namely, $7.97, represented collection fees and charges.

Yours very truly,

F. E. SWINGLE,
Auditor.

FES:RFA".

LOUIS OFFERMAN for The White-Phillips Company on direct examination testified as follows:

167 I live at Davenport, Iowa, and am 19 years old. In September of 1930 I was employed by The White-Phillips Company in Davenport, and I did most everything,
168 but I did not do any buying or selling of bonds. I was general utility office boy. In the morning I would go to the Post Office, get the mail and bring it back to the office. Then we would go through the procedure of opening and distributing it. Albert Drumm would help me. When we opened the mail we would first sort the personals, which we would not open. Then the rest of it addressed to White-Phillips Company we would give to whichever department it was supposd to be. I do not remember ever having received the notice of stolen bonds marked Exhibit #13.

104 That clip was on this glass cage and it was on the west side right near the desk where we opened the mail. I don't remember when I did start with White-Phillips Company. During this period most any kind of notices and circulars and stuff we did not know what to do with were put on the hook. We were never di-
170 rected by anybody to do that. It was just a catch-all.

Cross-Examination.

After we opened the mail we would look it over and see what it was. Then I exercised my judgment after I read the document as to whether it pertained to the business of the Company and should go to someone in authority over me. If I thought it pertained to most everybody I put it on the clip not because I was directed to, but something that did not go to anybody in particular. I put it there so if they wanted to read it is was up to them. It was not up to them to read it, but if they noticed it all right. More than likely I got notices of se-
172 curities having been stolen and put them on the clip, but none that I remember. I don't remember ever having received that notice (Exhibit #13), until after Mr. Ehlers found it and called my attention to it. I do not remember the date when Mr. Ehlers called my attention to it. He found it on the hook or clip. At that time I

had no recollection when I first saw it, or whether I had ever seen it before Mr. Ehlers showed it to me. This is due to the fact we had gotten so much of this stuff. Mr.
173 Ehlers must have taken it off the clip and then called our attention to it.

When I saw this Exhibit #13 Mr. Ehlers had it in his possession.

105 I began working for the Company on July 7th, 1929. Besides myself, Mr. Drumm would open the mail and occasionally Mr. Crow, if there was too much, like on Monday.

174 ELBERT B. DRUMM for The White-Phillips Company on direct examination testified as follows:

I am 21 years of age and live at Blue Grass, Iowa about 10 miles west of Davenport; am now unemployed; was working for The White-Phillips Company in September 1930, and had worked there about eight months in the Collection Department. My business there was sending out maturing bonds and coupons that were due. I had nothing to do with the buying of bonds.

175 I assisted Mr. Offerman in slitting the mail and taking letters from the envelopes and distributing it to the departments. When mail was brought in by Mr. Offerman he would lay it on the desk where he usually opens the mail. Then we would sort out the personal mail and then take the letters and open them. We would first stamp the letters as received. Then we would distribute them to the respective departments.

When I went to work there, nothing was said to me about the clip or hook. We would put miscellaneous papers or junk that we did not know what to do with, that
176 was of interest to more than one party on the hook. I do not remember of the coming into the office through the mail of the mimeographed notice from the Foreman bank; don't think I ever saw it before and my attention was never called to it by anybody. I might have seen that notice but I don't recollect it.

Miscellaneous papers or junk was placed on the hook.
177 Notices as to traffic regulations on the street have been placed there. If this notice was found on this hook
106 in all human probability it was put there either by
178 me or Offerman, but I have no recollection about it.

When I opened the mail in the office I would look it over to determine its contents and decide what distribution would be made of it.

I don't know the reason of notices being sent in the mail to us of market bonds and securities and did not
179 know the effect of giving such notices. I understood at the time of opening the mail that such notices were sent because the seller, who had lost his property by theft, did not want it purchased by our firm. Papers similar to that were treated in the same way. We would put it
180 on the clip so anybody who desired to go over the mail that had not been distributed might see it there if they wanted to. If a notice came in the mail that certain securities had been stolen and afterwards the securities described in that notification were presented to be purchased by our concern, the only way the corporation and its employees could find out or would know that they had been notified that they had been stolen would be by referring to that clip.

181 We had a stamp showing the receipt of mail; just a rubber hand stamp to impress on the article. We put it on everything unless the papers were stuck together and never got stamped; don't remember whether we put it on everything that went on the clip. It all depends on who stamped the mail. The stamp had a date on it.

The stamp is not on Exhibit #13. Sometimes the papers were stuck together and never got stamped.

107 MRS. ARNO SCHRIEFER for The White-Phillips Company on direct examination testified as follows:

I am the wife of the Arno Schriefer who testified in this case. In September of 1930 I was employed in the
183 Chicago office of The White-Phillips Company, Inc., as a stenographer. While there I did not learn before the purchase of the Illinois Highway Bonds that they were claimed to be stolen and I never saw any notice that came in there of the stolen Illinois Highway bonds.

MRS. ERNEST BELL for The White-Phillips Company on direct examination testified as follows:

I am the wife of Ernest Bell, the Assistant Secretary of The White-Phillips Company, Inc., in Chicago and
184 was such in 1930. I was then employed by The White-Phillips Company as a stenographer and had no other duties to perform.

During the time I was in the office and before the purchase of these Illinois Highway bonds I had no knowledge that they were claimed to be stolen. I never saw any notices from Foreman State Bank or anybody else in the office at Chicago of the fact that certain Illinois Highway bonds had been stolen.

(All Exhibits for White-Phillips Company, Inc. that have been identified and numbered, admitted in evidence without objection.

RICHEY V. GRAHAM, called as a witness in behalf of Richey V. Graham on direct examination testified as follows:

I reside at 1916 South Austin Boulevard, Cicero, Illinois. I am an attorney at law and a State Senator; have been a member of the Legislature for four years.
186 In September 1930 my office was at 3347 West Twenty-sixth Street, and I am one of the defendants in the interpleader suit now on hearing.
187 The eight original bonds of which photostatic copies have been introduced were in my possession on August 29, 1930, which was Friday. I last saw them at my home at 1916 South Austin Boulevard, on August 29, 1930. Previous to that they had been at the First National Bank of Cicero in my custody.

I was going up to Antioch, Illinois, and I took the bonds out of the box. I was going to take them to the Lawndale National Bank for the purposes of putting them up as collateral to consummate a deal I had pending. I left for Antioch about six o'clock on the night of the 29th, and I intended to go to the Lawndale Bank first thing
188 Tuesday morning. When I left, the bonds were in a safe that stands about four feet high in my basement. I returned to my residence on Tuesday Morning, September

2nd. When I got back I found that my residence had been looted and ransacked and the burglar alarm torn off. A burglary had been committed. I looked in the
189 safe where the 35 bonds were and they were missing. These 8 were a part of the 35. They were all the same kind of bonds, all Illinois Highway 4% bonds under the Act of 1923, the same bonds as these but different maturity dates. I had left nobody in the house. The occupants of the house were with me at my summer home at Antioch.

The house was ransacked sometime between Saturday and Monday and they had already notified the Cicero police and had a man stationed in the home when I got there. I notified the Chicago police and they sent out finger print experts. I notified Pat Roche, Chief Investigator of the States Attorneys office. I also no-
109 tified the State Treasurer as to the number of the bonds and the coupons that were attached; also notified my bank at Lawndale, the Lawndale National Bank and the Foreman State Corporation which I had done business with.

190 The theft of the bonds was extensively written up in the Chicago newspapers. I notified the State Treasurer by long distance telephone and confirmed it by telegram on the 2nd of September. Also notified the National City Bank of New York and the Guaranty Trust. That was one of the banks where these bonds could be paid, and had the notice sent to all banks. Exhibit #2 is that notice.

Bulletin No. 146 of Illinois Bankers Association was sent out on September 5, 1930 to all banks.

192 I directed them to be so sent and I saw it at the time. (GRAHAM EXHIBIT #2 admitted in evidence).

W. P. Exhibit #13 headed "Stolen Bonds and Securities, Foreman State Corporation" is the notice sent out by the Foreman State Corporation to all bonds and brokerage houses, dealers in Municipal bonds. I gave the direction to do this. Mr. Gebhardt Foreman, who is
193 now out of the City, will supply me with a list of everybody to whom these notices were sent in return envelopes.

When these bonds were in my safe number 11 coupons were on them due September 1, 1930. The number 11 coupons have never been presented on any of the bonds

for collection. The number 12 coupons were presented shortly after the 1st of March to the State Treasurer and he refused payment and notified me who had the bonds. I have the number 10 coupons of all these bonds in my possession but have not collected them.

I have 12 of the bonds in my possession and the other 15 are now in the process of being returned to me. The 12 bonds were sent by Mrs. Connolly through the 110 mail to an Attorney in New York to her husband who was then in the Federal Detention Prison. He tried to sell them through Halsey Stuart Company; we were notified and sent and secured the bonds.

The other 15 bonds were sold by a man that had come from San Francisco, through Colvin and Company and Connolly tried to dispose of the bonds and could not, so they were picked up by the Fidelity and Casualty Company of Maryland. The Fidelity and Casualty Company was the surety for Colvin and Company, a Chicago firm which is now bankrupt.

195 Graham Exhibit #1 is a letter of White-Phillips Company dated March 13, 1931, received by me in the ordinary course of the mail. I retained a carbon copy of the letter of which it speaks as coming from me dated March 12th. Graham Exhibit #4 is the carbon copy of an original letter I sent to the White-Phillips Company.

(GRAHAM EXHIBITS #3 AND 4 offered in evidence).

196 I am the owner of the 8 bonds in question and was such owner while they were in my possession.

They rifled the safe and worked the combination and these bonds were not the only things stolen.

GEORGE WILLIAMS, called as a witness in behalf of Richey V. Graham, on direct examination testified as follows:—

I live at St. Clair Hotel, Chicago, and for the last four years I have been an investigator for the States Attorney's office. I know Carl Stutz of Davenport, Iowa and I first met him at the St. Paul Hotel in St. Paul, Minnesota, on or about September 24, 1930, and had a conversation with him with reference to the 8 bonds in question in this suit.

198 Graham Exhibit #1 was given to me by Mr. Stutz in St. Paul, Minnesota on the occasion of the first interview around September 24, 1930. He told me that this
111 exhibit was the notice of the stolen bonds in the Chicago office. I asked Mr. Stutz how it came that a reputable security house came to purchase these stolen bonds. He said: "The man who had charge of the checking of the bonds was out or off that day and someone green in the work was there and it had been overlooked".

At that time I received the complete file of Mr. Stutz. Later he came to the Chicago office and wanted a copy of the originals, and with the exception of this they were given to him and photostats made by our office.

At that time Mr. Stutz gave me Graham Exhibit #5 which is a carbon typewritten confirmation of a telegram from J. A. Connolly.

A letter from the Davenport office of The White-Phillips Company on the stationery of the Davenport office dated September 25, 1930 addressed to C. N. Stutz in the care of the St. Paul Hotel, St. Paul, Minnesota, and reading "Dear Carl: At Mr. Phillips' suggestion we enclose herewith by air mail the file on the Connolly
200 matter. Very truly yours", was first seen by me when Mr. Stutz turned the same over to me up there at St. Paul on the 26th. Mr. Stutz told me it was the practice of the Company before a deal was consummated for the purchase of bonds to have an attorney's opinion accompany the same. He told me there was no attorney's opinion with these bonds, but that on or about September 22nd, the opinion did arrive. I have never seen it.

I remember asking him if he had notice that the bonds were stolen and he gave me the paper known as Graham Exhibit #1 and told me that this was the notice in the
201 Chicago office; that this was attached to the files.
112 That was a part of the file he had in connection with the letter marked Graham Exhibit #6. Mr. Stutz informed me that that was the complete file in the Connolly case.

I do not know who wrote in leadpencil on the back of White-Phillips' Exhibit #13 "501 Temple Building" but at that time the office of Mr. Roche was at that place. I don't remember of ever having had that Exhibit in my possession. The one I got was the yellow sheet. I have never seen the white one to the best of my recollection.

202 With reference to notifications as to stolen securities, I have been assigned on bank robberies practically the last two years, in Chicago, and at times I have gone out-
203 side of Chicago. The course of business of these houses in Chicago with reference to keeping track of notifications as to stolen securities is before the purchase of securities a check is made against what they call their live file, in other words notifications of bond thefts.

I indirectly knew of Connolly at the time of my trip to St. Paul. I then made a contest with Mr. Reilly in
204 charge of the United States Secret Service in St. Paul, and Mr. Johnson, Chief Postal Inspector. Until this case I had not done any work with reference to operations of Mr. Connolly on stolen bonds. He was in Prison in New York.

CHARLES S. WHARTON, called as a witness in behalf of Richey V. Graham, on direct examination testified as follows:

I reside in Chicago, Illinois, and was an associate
205 of Senator Graham for sometime. I have tried to help in this case and went to St. Paul and to Davenport for that purpose. My recollection is that I had an interview on May 2nd, of this year at Davenport in the office of White-Phillips Company, and that I talked to Mr. Stutz, Mr. Alexander and Mr. Phillips. That interview
113 was arranged by John Weir, District Attorney of that county and his assistant Mr. Grapes and the Assistant District Attorney or States Attorney from Rock Island, Coyle. I walked into the office between the hourse of nine and ten in the morning and asked for
206 Mr. Stutz and was shown into his office and I told him I was there to make an investigation in the matter of the bonds which had been stolen from Senator Graham. Then Mr. Alexander was called in and also Mr. Phillips came in. I asked Mr. Stutz if he had had this matter up with Mr. Williams who represented the States Attorney's offices from Chicago and who had made some investigation in this matter. I told him I was down there to investigate whether there was notice given to The White-Phillips Company and Mr. Stutz said he had turned over all the files to Mr. Williams, and I think he

said that he had received back the originals with the exception of that notice concerning the fact that these
207 bonds were stolen bonds which he said he presumed Mr. Williams still had. I asked him if they received any notice. He got up and walked over towards that part of the room by a table and he said that a Mr. Ehlers came to him and said: "We have just received some bonds; I wonder if any of those bonds are concerned with that notice we got here." And Mr. Stutz said: "We walked out and the notice was on the table", and he looked at it and all of the 8 bonds were on the table at the same time that were concerned in that notation.

Mr. Alexander was the first one to leave the room and that left Mr. Stutz and Mr. Phillips and myself in Mr. Stutz' office. Mr. Phillips did not take very much part in the conversation. I asked Mr. Stutz if it was true that they owed this bank that has failed here a large amount
208 of money, something like $300,000.00 and were trying to settle for $25,000.00 and he said no. He said they
114 owed the bank that has failed here $25,000.00 and that they owed another bank about $300,000.00, but that these bonds in question had not been put up as collateral to any loan.

(GRAHAM EXHIBITS Nos. 1, 5 and 6 admitted in evidence.)

211. VERNON EHLERS recalled on behalf of The White-Phillips Company on direct examination testified as follows:

I have seen Graham Exhibit #1, being the same wording as our Exhibit #13 which came from the clip. I saw the original that day and wrote the letter and put that on there in my own handwriting and mailed it to Mr. Stutz after the discovery that the bonds were stolen. I
212 mailed it to him in St. Paul. It is a copy which I made of the original Foreman notification, mimeographer on white papers which has been introduced in evidence by me. Insofar as I am concerned this yellow paper never emanated from or had its origin in the Chicago office.

CARL STUTZ recalled on behalf of The White-Phillips Company on direct examination testified as follows:

I met a Mr. George Williams, an investigator from the States Attorney's office in Cook County in St. Paul in September 1930 and I handed him my file. Graham Exhibit #1 is part of the file that I handed Mr. Williams. In that conversation I did not say to Mr. Williams that the man who had charge of the checking of the bonds was out or off that day, and someone green in the work was
216 there, and that the notice (Graham Exhibit #1) had been overlooked. I did not say in that conversation that this yellow Exhibit #1 which was in the file which I handed to Mr. Williams was the notice that was in our Chicago office. I did not on that occasion give this Graham Exhibit #1 to Mr. Williams and say that
115 this was the notice in the Chicago office. If I remember correctly, this Graham Exhibit #1 came as a copy of the original notice which was received at Davenport and came from Davenport and all the balance of the correspondence which I gave him came from Chicago.

Cross-Examination.

217 I was not at the Chicago office at any time with reference to familiarizing myself with mail that came in there. I know the Foreman State Corporation, but don't know whether we were on their mailing list in Davenport or not. We did occasionally receive circulars from Foreman.

G. T. RICHARDSON, called as a witness in behalf of Richey V. Graham, on direct examination testified as follows:

I am Vice-President of Kelly-Richardson & Company.
218 In September of 1930 and before I was Vice President of Foreman State Corporation. Their office was at 33 North LaSalle Street, but that concern is not now in business. It was affiliated with the Foreman National Bank.

I recall having seen W. P. Exhibit #13. I remember

that about September 1930, Alfred K. Foreman called me down to the bank and told me about the so-called stolen bonds, and asked me what procedure to follow. I suggested that he have the bank send out notices to the various banks that they were in communication with and at the same time we and the Foreman State Corporation would send out a notice to the various municipal dealers that we were in the habit of sending circulars to. After
219 instructing Alfred K. Foreman as to how the bank should handle sending out notices I came back to the Foreman State Corporation and talked with Mr. A. J. Pickard, and the result of our conversation was that he wrote out the notice in regard to the stolen bonds.
220 116 He then held the title of manager of the Municipal Department of the Foreman State Corporation. The Municipal Department was under my direct supervision, although at the time this happened I was also in charge of sales and Mr. Pickard was doing most of the municipal work then—more than I was.

I know that he had the notice made up after which he brought it to me, and we talked it over and decided that
221 it was O. K.; and after I saw it that time it went into the process of being sent out.

I believe that Exhibit #13 is the notice that was compiled under my supervision and jurisdiction.

The process of sending out notices of this kind through the mail by the Foreman State Corporation was that first a stencil was cut, the notice was mimeographed, we then would get stamped, addressed envelopes from Miss Graf who was in charge of the Filing Department and after the stencil was cut we would either send out the mimeographed notice to Miss Graf to send out, or our Department would do it themselves. By stencil I mean a stencil for mimeographing.

In the Municipal Department of the Foreman State Corporation at that time were Richardson, Pickard, Cor-
222 bett and Mrs. Sleeper, and also a married woman by the name of Sullivan, I think. The mimeograph department handled the municipal work for every department of the Foreman State Corporation. The mimeograph department did not mail out the letters, they would merely mimeograph the notices and then return them to the department or anyone designated by the Department.

The mailing might have been done by the filing de-

partment under the jurisdiction of Miss Graf; in an emergency case such as this it might have been mailed
117 by our own Department. It is quite possible that the notices were actually stuffed into the envelopes in our department and it is also quite possible that it did not go through the routine of Miss Graf because of
223 the emergency nature of it. That organization was disbanded in June 1931. I know Senator Graham and I talked with him over the telephone with respect to these stolen bonds and from him received the serial numbers of the bonds that were supposed to have been stolen. This I did about September 1930. I caused the notices to be sent out within an hour, I should say, after I got the serial numbers of the bonds from Senator Graham. I do not know which department or what person mailed out those notices.

A. G. PICKARD, called as a witness in behalf of Richey V. Graham, on direct examination testified as follows:

I am now engaged in business with C. F. Childs & Company in the Board of Trade Building. I was in the employ of the Foreman State Corporation from October 1, 1929 until it closed up in June or July of 1930. I was in the Municipal Department. Mr. Richardson, the Vice-
225 President was the head of that Department. Mr. Richardson's Department had the entire sixth floor of the Foreman State Bank Building and practically all of the fifth floor.

W. P. Exhibit #13, is, I believe, the one that I dictated and sent out. I recognize the contents. I do not recollect the date when I first got information that caused the issuance of this notice, but I do remember the circumstance of Mr. Richardson coming back during the busy part of the day, between 12 and 2, and telling me that those bonds had been stolen. And we talked over what we would do, and the notice was immediately dictated so it would get into the mail that night; don't remember
226 whether it was in September or October. I dictated the notice to a girl who wrote a rough copy and showed
118 it to me and a stencil was then cut from the rough copy, and I probably read only the little blue like type copy that comes through the stencil, that is what I always

did look at. And I don't know that I saw the actual notice until the next day after it had come out. That would be the normal routine.

We had two mailing lists which were under my supervision, one called the regular municipal list and the other the special municipal list. I checked and revised these lists every two or three months to add new names and take off names. This special municipal list was a very small list of twenty or thirty names that we sent out daily letters to; the whole list was not over a hundred and this list was a short list; and this notice was sent to the regular list.

227 Envelopes would have been run off by the mailing or filing department, whatever you choose to call it, Miss Graf, in charge; and these notices were stuffed in these envelopes and mailed. I don't know what person connected with that mailing department sent these letters out. I called Miss Graf on the inter-communication telephone system that we have, and told her to run off envelopes, that we had a stencil to go out; but who actually did it, I have no information.

We got only one response from any of these notices and that was from Halsey Stuart & Company.

228 I don't know whether Halsey Stuart & Company was on that very special mailing list or not.

W. J. CORBETT, called as a witness in behalf of Richey V. Graham, on direct examination testified as follows:

I am now connected with Kelly-Richardson & Company and I was under Mr. Richardson and Mr. Pickard in the Municipal Department of Foreman State Corporation from November 1929 until they closed.

119 Don't know definitely whether I have ever seen de-
229 fendant's Exhibit #13 before or not but I have seen the same form, with reference to those bond numbers. The first form I saw it was in a stencil that had been cut and then after that I saw them on the paper that it had been run on. It was on a sheet of plain paper.

At that time my duties with the Foreman State Corporation was buying municipal bonds. I was inside all the time as an employe under Mr. Richardson and fol-
230 lowing his directions as to anything that would come up.

As to mailing communications of this character, after the stencil had been cut in our department it was taken back to the mimeograph machine on the sixth floor and run on that machine by a young lady there; then the form was either sent down to Miss Graf's department to be stuffed in and mailed or the mailing department on the sixth floor; there were several boys there and one man had charge of the mailing on the sixth floor; or stuffed in the municipal department if it was municipal work.

I have no idea where the employees of the Foreman State Corporation now are. That corporation suspended operations in June of 1931 at the same time that the bank was taken over by the First National Bank.

231 IRENE L. GRAF, called as a witness in behalf of Richey V. Graham, on direct examination testified as follows:

At the present time I am employed in the real estate and loan department of the First National Trust & Savings Bank. In September of the year 1930 I was in charge of the filing department of the Foreman State Corporation. I had supervision of the filing department and taking care of posting sales and the salesmen; taking care of the mailing list, and supervising the mimeographing.

120 I do not recall the matter of notice being sent out as to bonds having been stolen as set forth in de-
232 fendant's Exhibit #13, I don't recall ever seeing this particular notice at all.

Generally in sending out notices Mr. Richardson, Pickard or Mr. Corbett would call me and ask me to send out envelopes, or have envelopes addressed to the very special municipal list or on the regular municipal list which I would do and then send the envelopes upstairs to them. Later on around January of 1931 we finally got together on this municipal list; before then they would handle the municipal end of it almost exclusively and for a time I did not know what they were doing; but I made a suggestion that I should receive copies of what they were sending out down in the filing department. Before that I simply had the envelopes addressed and sent upstairs to Pickard or Mr. Richardson, whoever suggested having the envelopes addressed.

233 The Very Special Municipal List consisted of 35 or 40 names, maybe not that many. Envelopes were addressed daily and sent out on special offerings every night on that list; and then weekly we would have envelopes addressed on the Special Municipal List, which was a list of 150 to 250 names probably. My recollection is that The White-Phillips Company was on that Very Special List. I checked over our control file and I found that we
234 had White-Phillips & Co. on the Special and also on the Municipal List. The addressograph list showed no record of the old address; on the control file we never erased an address at all; we just simply scratched it out in red ink and typed the new address up above it so that we would always have a record of the old address; I checked the controls the other day and found that we had White-Phillips & Company at 39 South LaSalle street, but no date is designated on the card, which was automa-
121 tically changed. I kept the addresses up to date in this Very Special Municipal List and made the changes as I was notified and I would check constantly every morning in the Tribune. Don't remember when White-Phillips Company moved over to One LaSalle.

235 Halsey Stuart & Company, 201 South LaSalle street was on that Very Special Municipal List on September 1, 1930. Halsey Stuart was a popular dealer and we put them on the Special List so they would receive our special offerings. I would not say if they were in this list in September 1930 because we constantly were putting on and taking off; Mr. Pickard would go through the list and those he wanted off he would give me a notation and I would automatically take them off the list; and then he would add some new names to the list.

The White-Phillips Company at Davenport, Iowa, was probably on our Special Municipal List.

236 The Very Special would go out every night; I had envelopes addressed every day; and the others would go out once a week; they received weekly offerings. The Very Special list that White-Phillips was on is their Chicago address.

I was employed by the Foreman State Corporation from September 13, 1926 until closing June 6, 1931. When letters were prepared they would go out almost immediately. They would have a girl who was under my supervision run off a stencil or type a stencil; they would

submit the stencil to her and she would run it off and it would immediately be sent up to the department that very day for mailing that night.

237 After we became a Corporation up on the sixth floor we had our own mimeograph department; prior to that, of course, it was run by the bank and we were just the bond department at that time. The mail went out the night of the day it was prepared unless it was a spe-
122 cial order in advance of securities, and it would be held over. Answers came through the mail to communications that went out in that way. I had knowledge from my own observation of the mail that went out and also of the receipt of answers by mail; that was the process.

238 Mr. Curtis who was in charge of the mailing department had two or three boys in his charge; they would see that the mail would be sent to the Post Office; in some cases the envelopes would be stuffed by them; and in most cases the municipal department would handle their own almost exclusively. They just simply had their envelopes made out, usually by one of the girls, probably Mr. Corbett would see her, and may be designate one particular boy to handle it. A large volume of mail went out every day. I don't think there is any way of tracing this Exhibit #13 from Mr. Richardson to the mail box. There was large quantities of mail went out in that way. Part of the process was that I prepared the envelopes from the addressograph and delivered them to the department where they were stuffed by someone else.

239 *Cross-Examination.*

We would get answers to mail that was sent out in this manner sometimes but in a large majority of these circulars sent out from this Very Special mailing list we did not get any answers at all because most of the time it was just circulars or offerings that went through the mail.

240 I do not have any recollection of this Exhibit #13. Don't recall whether it ever came into my hands or not; it might have been handled exclusively by the municipal department. Don't know whether any envelopes were addressed containing these circulars. They would just ask me to have the list run off which I would do and send

it up to the municipal department. Personally I do
123 not know whether any of these circulars ever went out from the Foreman State Corporation.

RICHEY V. GRAHAM, recalled on direct examination, testified as follows:

241 I recall giving notice to Mr. Richardson of the bonds that had been stolen. I did that on the 3rd day of September 1930.

Mr. Richardson got in touch with me at my office at 4347 West Twenty-sixth street, Chicago, to check up on what notice I had sent out; that was on the 2nd. day of September, the morning that I discovered the loss. When I got through talking I had explained to him that I had notified the bank. Notice dated the 4th day of September was sent out through the bank under the Illinois
242 Bankers Association. He asked me to check over the numbers. I had given a slip with the numbers to Mr. Cermak, who first got in touch with the Foreman Corporation, and then through them Mr. Richardson got in touch with me. I checked the numbers, the date of expiration, etc., and he told me that the lists would be run off on a mimeograph and sent out after that.

Exhibit #13 is a mimeograph copy of the notice that was sent out. I first saw it on the 4th or 5th day of September. A copy of one of these notices was sent to my office in the mail.

243 In the latter part of August or in the first few days
244 of September 1931 I got a call from Halsey Stuart in Chicago, stating that 12 bonds had been presented. They called me up with reference to these stolen bonds. That
245 was practically one year later.

The Illinois Bankers Association sent the notice to the banks.

(W. P. EXHIBITS #17 and 18 admitted in evidence.)

124 The Exhibits offered and admitted on behalf of the respective parties were as follows:—

EXHIBITS OF WHITE-PHILLIPS COMPANY, INC.

EXHIBIT 1.

J. A. Connolly
Investment Securities
705 Guardian Life Building
Saint Paul, Minnesota

(Stamp:) Received Sep 16 The White-Phillips Co.

September 13th, 1930.

White-Phillips Company, Inc.,
39 So La Salle street,
Chicago, Ill.

Gentlemen:—

Kindly furnish firm bids for immediate delivery on following bonds:

$5000 Illinois Highway 4s, dated 3/1/25; due 3/1/54.
3000 " " " " " ; " 3/1/46.

Please wire quotations, my expense, and oblige,

Very truly yours,
J. A. CONNOLLY

JAC/JR

125

EXHIBIT 2.

Title page of book of 1038 pages.

"Security Dealers of North America
1930 Edition".

Also item on page 321 in director of Minnesota dealers in St. Paul;

"Connolly, J. A.
Guardian Bldg.,
Miscellaneous Securities: Corporate Financing.
Phone—Garfield 2118".

EXHIBIT 3.

Telegram from White-Phillips Co. Inc. at Chicago to Connolly at St. Paul.

"Are Illinois fours annual or semi-annual interest".

EXHIBIT 4.

Telegram Connolly to White-Phillips Co. Inc. dated Sep. 16, 1930.

"Re tel. Illinois fours semi-annual March and September first".

EXHIBIT 5.

Telegram White-Phillips Co. Inc. to Connolly dated Sep. 16.

"Bid ninety nine half for eight State of Illinois bonds your wire firm thru today."

EXHIBIT 6.

Telegram Connolly to White Phillips Co. Inc. dated Sep. 16.

"Re tel. offer eight thousand Illinois Highway fours of forty six and fifty four at ninety nine half".

126 EXHIBIT 7.

Telegram White Phillips Co. Inc. to Connolly dated Sep. 17.

"Will buy eight thousand Illinois highway fours of forty six and fifty four at ninety nine half".

EXHIBIT 8.

Telegram Connolly to White Phillips Co. Inc. dated Sep. 17.

"Re tel Confirm sale to you eight thousand Illinois highway fours of forty six and fifty four at ninety nine half".

EXHIBIT 9.

Carbon copy letter White Phillips Co. Inc. Chicago to Connolly, St. Paul.

"In accordance with our exchange of wires, following your letter of the 13th, this will confirm purchase from you today of $8000. 4% State of Illinois Highway bonds, dated March 1, 1925 maturing $5000 March 1, 1954 and $3000 March 1, 1946, semi-annual interest at price 99½.

Please ship the bonds to our Davenport office through the American Commercial and Savings Bank, of Davenport.

Assuring you we are glad to have this business with you, and trusting we may have many more transactions with you, we remain."

EXHIBIT 10.

Letter Connolly at St. Paul to White Phillips Co. Inc. at Chicago Dated Sep. 17.

"I confirm sale to you of;
$5000 State of Illinois Highway 4s, dated 3/1/25; due 3/1/54
$3000 " " " " " due 3/1/46 at 99½
$7960. Accrued interest 9/1-9/18, $15.12
$7,975.12".

127 EXHIBITS 11A and 11B.

Original and photostat of check dated Sept. 22, 1930 in sum of $7975.12, drawn by The White Phillips Co. Inc. at Chicago, on Northern Trust Co. Chicago payable to Nat'l Bank of the Republic Chicago.

EXHIBITS 12 and 12A.

Original and photostat of sight draft drawn at St. Paul, dated Sep. 17th 1930 by Connolly on White Phillips Co. Inc. at Chicago payable to Transportation Bank of Chicago in sum of $7975.12.

EXHIBIT 13.

Mimeographed typewritten document on paper 8½ inches by 10¾ inches, the typed matter occupying a space in center of sheet 4 inches by 4½ inches.

"STOLEN BONDS.

One of our clients has had stolen $35,000 State of Illinois 4% Highway Bonds dated March 1, 1928. The numbers are
2845 to 2849 due March 1, 1946
8901 to 8925 due March 1, 1949
18897 to 18901 due March 1, 1954.

If any of these bonds are presented to you for sale or trade, kindly notify us

FOREMAN-STATE CORPORATION".

On back in lead pencil, "501 Temple Bldg."

EXHIBIT 14.

Telegram Connolly to White-Phillips Co. Inc. dated Sep. 25.

"Regarding Wednesday telephone conversation sorry but for the present must decline to repurchase Illinois Highway fours".

128

EXHIBITS 15A to 15H.

Photostats of eight bonds in controversy.

EXHIBIT 16.

Letter date Chicago Ill. Sep. 22, 1930 on White-Phillips Co. Inc. letter head;

"Chicago, Ill. Sept. 22, 1930.

Davenport Office

Dear Verne:

The following represents the amounts drawn on our Northern account today:—

$997.90—in payment of the $1000. River Forest School Bond delivered to us by Halsey, Stuart & Company.

$7,975.12—in payment of the $8000 State of Illinois Highway Bonds delivered to us by the National Bank of the Republic, for the account of Mr. J. A. Connolly, of St. Paul, Minn. This was a certified check.

$26,075.85—in payment of the $25,000. City of Detroit 4½s delivered to us by the Continental Illinois Bank & Trust Company for the account of the Guardian Detroit Company, of Detroit, Michigan. This was a certified check.

All of the above bonds, totalling $34,000. are being shipped to you today, under separate cover, by registered insured mail.

I didn't like to spend the money to wire you this morning, but when the State of Illinois and Detroit Bonds came in, requiring certified checks in payment, thought I had better let you know about how much I was spending out of the amount you were depending on to be deposited today.

Copies of the bills and check slips are attached for your information.

ERNIE.

Copy of the opinion on the State of Illinois Bonds is attached."

129 EXHIBITS OF RICHEY V. GRAHAM.

EXHIBIT 1.

Typewritten copy on Sheet of yellow paper of Exhibit 13 of White-Phillips Co. Inc. as above

In pencil, the words "Read this". In ink some writing addressed to "Carl".

EXHIBIT 2.

A circular of Illinois Bankers' Association, Protective Department dated Sep. 5, 1930 giving a list of bonds and securities stolen.

EXHIBIT 3.

Letter dated Davenport Ia. March 13, 1931 on White Phillips Co. Inc. letter head addressed to Graham.

"We have your letter of March 12th, You know the details of this bond transaction as well as we do since we reported that the bonds were in our possession immediately after we learned they had been stolen. The September coupons were detached before the bonds came to us. If you have something to suggest, let us hear from you.

Our Chicago Office has been moved to No. 1 North La Salle Street".

EXHIBIT 4.

Carbon copy of letter date March 12th 1931, Graham to White-Phillips Co. Inc. at Davenport.

130 "March 12th, 1931.

The White-Phillips Co.
1st Natl Bank Bldg.
Davenport, Iowa.
Att. E. W. Dunn.

Gentleme,

I am writing to you with reference to the eight Illinois Highway Coupons due March 1st which you have sent to the State Treasurer for payment, the Bond numbers being

as follows #2847-2848-2849-18897-18898-18899-18900 and 18901.

For your information please be advised that these are a part of the bonds which were stolen from me Sept. 1st, 1930 and on which a stop order of payment has been placed against the same, at that time all banks were notified together with Investment houses etc.

I am now having a bill drawn for the protection of my property and would like to have you advise me who turned these bonds over to you.

These bonds also had the Sept 1st 1930 coupons attached none of which have ever been presented for collection, in fact no coupons on any of the bonds stolen till the eight you have presented.

I note from your stationary that you have a Chicago office at 39 S La Salle Street and I will take the matter up with them also, but I would like to have a word from you as to these bonds coupons of which the State Treasurer is now holding.

Awaiting your early attention to this letter, I am,

Yours very truly,"

EXHIBIT 5.

Carbon copy of White-Phillips Co. Inc. Exhibit 14 as above.

EXHIBIT 6.

Letter on letter head White Phillips Co. Inc. dated Chicago 9/25/30 to Stutz at St. Paul from Arno Schriefer.

"At Mr. Phillips' suggestion we enclose herewith by air mail the file on the 'Connolly' matter".

The above and foregoing is all the evidence introduced before the Master in Chancery and by him reported to the Court, and heard and considered by the Court on the trial of the said cause and all proceedings had in the trial there.

131 Wherefore, the White-Phillips Company, Inc., appellant, prays that the above statement of evidence be settled, approved and allowed by the Court as a true, full and correct and complete statement of all the evidence taken and given before said Master in Chancery and reported to the Court and heard and considered by the Court on the hear-

ing thereof, for use on the appeal taken on the 28th day of December 1933 to the Circuit Court of Appeals for the Seventh Circuit.

Dated the 28th day of December 1933.

WILLIAM L. PATTON
WINSTON STRAWN & SHAW
Attorneys for The White-Phillips Company, Inc.

132 STIPULATION.

It Is Hereby Stipulated that the above and foregoing statement of evidence is true and correct and may be approved by the Judge without notice.

Dated this 28th day of December 1933.

WILLIAM L. PATTON
WINSTON STRAWN & SHAW
Attorneys for The White-Phillips Company, Inc., Appellant.

JAMES J. BARBOUR and
DOYLE, SAMPSON & GIFFIN
By W. EDGAR SAMPSON
Attorneys for Richey V. Graham, Appellee.

133 CERTIFICATE OF JUDGE.

The foregoing statement of evidence is in all respects hereby approved and settled as a true and complete statement of the evidence adduced before and reported by the Master in Chancery to whom this cause had been referred, and all the evidence adduced, heard and considered on the hearing and trial by the Court of the above entitled cause, and the same is ordered filed and included in the record.

Dated this 28th day of December 1933.

CHAS G. BRIGGLE
United States District Judge.

Filed Dec. 28, 1933. S. T. Burnett, Clerk.

43 And afterwards, to wit: on the 10th day of August, A. D. 1933, there was filed in the office of the clerk of said court, a certain Master's Report and Findings, which said Report and Findings, was and is in the words and figures, following, to wit: Filed Aug 1933.

44 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption) * *

BEFORE THE MASTER IN CHANCERY OF SAID COURT, EDWARD P. ALLEN.

Appearances:

Mr. James J. Barbour Mr. W. E. Sampson On behalf of Ritchey V. Graham.

Mr. William L. Patten On behalf of The White-Phillips Co., Inc.

Mr. B. F. Catron, On behalf of Edward J. Barrett, Original Complainant.

45 MASTER'S REPORT.

I, Edward P. Allen, Master in Chancery of the United States District Court, for the Southern District of Illinois, Southern Division, in the above entitled cause, do respectfully report that pursuant to an Order of Reference heretofore made and entered in said cause by said Court on the 19th day of January, A. D. 1932, the parties to this cause, represented by Counsel, appeared before said Master in Chancery, Edward P. Allen, for hearings in said cause, all of which were held in the Cities of Springfield and Chicago, in the State of Illinois, commencing May 13, 1932, and continuing thereafter on various dates.

I report that the Solicitors for the defendant, Ritchey V. Graham, offered in evidence several papers and instruments in writing, hereinafter described, and caused to be sworn on behalf of said defendant, several witnesses all of whom testified as stated in the stenographic report of evidence hereto attached and made a part of these findings.

I further report that the Solicitor for the defendant, The White-Phillips Co., Inc., offered in evidence several papers

and instruments in writing, hereinafter described, and caused to be sworn on behalf of said defendant several witnesses, all of whom testified as stated in the stenographic report of evidence hereto attached and made a part of these findings.

I further report that upon the completion of the evidence introduced by the defendants in said cause, it was agreed that time should be given Counsel to consider the evidence when written up before the Master, and that briefs and reply briefs be submitted at a later date.

Thereupon the Master announced that the evidence on behalf of the parties hereto was concluded.

46 STATEMENT OF THE CASE.

The subject matter of this case is the claim for possession of eight $1,000.00 Illinois Highway Bonds that were stolen from the home of Ritchey V. Graham in Cicero, Illinois, on Friday, August 29, 1930. The bonds were taken from the Safety Deposit Box by the said Ritchey V. Graham and placed in a safe in the basement of his home in Cicero. The said Ritchey V. Graham left the said bonds in said safe over the week-end, and upon returning to his home on Tuesday morning, September 2, 1930, he discovered that his home had been burglarized, the house looted and ransacked, the safe opened by working the combination, and the bonds in question stolen.

Immediately upon the discovery of the theft of said bonds the said Ritchey V. Graham on September 2, 1930, notified the State Treasurer at Springfield, Illinois, and various banks, of the theft of said bonds. The said Ritchey V. Graham further notified the Foreman State Bank of the theft of said bonds, and inquired of the Foreman State Corporation, a branch of said Bank, as to the methods of sending out notices of the theft to dealers in municipal bonds, which resulted in the preparation of a notice, of which defendant herein, The White-Phillips Co., Inc., received a copy, marked "Exhibit 13".

A large number of these mimeographed notices was prepared, addressed and mailed to dealers in municipal bonds, a copy of which was addressed and mailed to The White-Phillips Co., Inc., at its Chicago office, and also one to the Davenport, Iowa, office of said Company; said notices being received by the said The White-Phillips Co., Inc., before

said bonds were offered to and purchased by the Chicago branch of said Company.

47 The White-Phillips Co., Inc., a Delaware Corporation, having its principal office in Davenport, Iowa, is engaged in buying and selling municipal securities, and the extent of its business for the fiscal year 1930 was approximately $14,500,000.00. The said Company maintains a Chicago office located at 39 S. La Salle Street, which has full authority to buy and sell bonds without consultation with the Davenport office as to the character of said purchases, but reporting to the main office at Davenport daily as to the amount of business transacted.

On September 16, 1930, Ernest Bell, the Assistant Secretary of said The White-Phillips Co., Inc., in the ordinary course of business at the Chicago office, received a letter from one J. Connolly, dated at St. Paul, Minnesota, September 13, 1930, which said letter is marked "White-Phillips Exhibit 1", asking for a bid on 5000 Illinois Highway Bonds 4-S, dated 3-1-25, due 3-1-54; 3000 Illinois Highway Bonds 4-S, dated 3-1-25, due 3-1-46; that said specific bonds were not described or identified by number or otherwise. After considerable negotiation, the said Ernest Bell, Assistant Secretary of said The White-Phillips Co., Inc., sent a telegram, marked "Exhibit 5", offering 99¼ for the said bonds, being the current price therefor, which said offer was accepted by said Connolly, and thereupon the said Bell closed the transaction by accepting the offer in said telegram, under date of September 17, 1930, and upon the same day the said Connolly confirmed the sale by telegram, "Exhibit 8".

On September 17, 1930, being the same day on which the transaction was closed and agreed upon, the said Connolly drew his draft on The White-Phillips Co., Inc., at 39 S. La Salle St., Chicago, for the price of the bonds, in the sum of $7,975.12, attached the bonds to the draft and forwarded

48 to Chicago. The bonds arrived in Chicago at the Transportation Bank, later the Congress Trust & Savings Bank, on September 22, 1930, attached to Connolly's draft, dated September 17, 1930, for $7,975.12, and the draft was presented for payment by the messenger of that Bank. Upon receipt of said draft the said The White-Phillips Co., Inc., handed the messenger a certified check for $7,975.12, payable by mistake to the National Bank of the Republic, and when informed of the error the Bank endorsed said check, which was paid to the Congress Trust & Savings Bank, and on Sep-

tember 22, 1930, payee bank remitted by telegraph to Connolly the proceeds of said draft. On September 22, 1930, being the same day the Chicago office received and settled for said bonds, said bonds were mailed to the Davenport office, with report of purchase, which said letter with the bonds was received at said Davenport office on September 23, 1930.

Between the dates of the theft of the bonds and their receipt at Davenport, on September 23, 1930, the office of said The White-Phillips Co., Inc., there had been received by the said Davenport office of said Company a copy of the mimeographed circular entitled "Stolen Bonds", marked "Exhibit 13" attached to the record in this cause; the said notice entitled "Stolen Bonds" received at the Davenport office of said The White-Phillips Co., Inc., in the usual course of business, was placed upon a clip, which was termed a "catch-all for a miscellaneous lot of mail", by a clerk of said Company; no one of the office force or any of the Executives of the Company examined the "junk" as it was termed on the clip, and no one examined said mimeographed circular entitled "Stolen Bonds", until after the bonds were received in the Davenport office of said The White-Phillips Co., Inc.

The evidence of claimant, Ritchey V. Graham, as introduced, was to the effect that the said Chicago office of
49 said The White-Phillips Co., Inc., was mailed a copy of the mimeographed circular entitled "Stolen Bonds", but the receipt of said circular being denied by the said The White-Phillips Co., Inc.

The day the bonds were received at the Davenport office of said The White-Phillips Co., Inc., on September 23, 1930, Mr. Vernon Ehlers, a stenographer in the employ of said Company, examined the said mimeographed circular, entitled "Stolen Bonds", as filed on the clip of said Company, and discovered that the bonds which had been purchased from the said Connolly were listed upon the said circular entitled "Stolen Bonds", as being stolen from the said Ritchey V. Graham, and thereupon immediately telephoned to the Chicago office of said Company, and informed Mr. Bell, the Assistant Secretary of said Company, that he, Ehlers, had discovered that the bonds were listed on said mimeographed notice, as sent out by the Foreman State Corporation; that upon receipt of this information Mr. Bell immediately called the said J. Connolly over the long distant 'phone, informing him of the situation, and that the bonds in question were stolen, and on September 25, 1930 the said Connolly sent a telegram

to the said The White-Phillips Co., Inc., declining to re-purchase the said bonds.

50 From the Evidence Introduced in This Case Before the Master, I Find As Follows:

That the said defendant, Ritchey V. Graham, was the owner of Eight $1,000.00 Illinois Highway Bonds, which he had taken from his safety deposit box and placed in his safe in the basement of his home located in Cicero, Illinois, on Friday, August 29, 1930; the bonds were left in said safe over the weekend, and upon returning to his home on Tuesday morning, September 2, 1930, the said Graham discovered that his home had been burglarized, his house looted and ransacked, the safe opened by working the combination, and said eight One Thousand Dollar ($1,000.00) Illinois Highway Bonds, the subject matter of this suit, stolen; that upon the discovery of the theft of said bonds on September 2, 1930, the said Ritchey V. Graham immediately notified the State Treasurer at Springfield, Illinois, and various banks and brokerage houses of the theft of said bonds; that the Foreman State Corporation, a branch of the Foreman State Bank, at the instruction of said Graham, sent out notices of the theft of said bonds to dealers in municipal bonds, which said notice was entitled "Stolen Bonds", a copy of said notice being marked "Exhibit 13" and made a part of the record in this case.

I further find that the evidence shows that the name of said defendant, The White-Phillips Co., Inc., was on the mailing list of said Foreman State Corporation, and that a copy of said notice entitled "Stolen Bonds" was addressed and mailed to said The White-Phillips Co., Inc., at their Chicago office, and also one to the main office of said Company at Davenport, Iowa, which said notice the said White-Phillips Co., Inc. acknowledged receiving at their main office in

51 Davenport, Iowa, before said bonds were offered and purchased by the Chicago branch of said Company.

I further find that The White-Phillips Co., Inc., is a Delaware Corporation, having its principal office in the City of Davenport, Iowa, and is engaged in buying and selling municipal securities, and the extent of its business for the fiscal year of 1930 was approximately the sum of $14,500,000.00; that the said Company maintains a Chicago office located at 39 S. LaSalle Street, which has full authority to buy and sell bonds without consulting with the Davenport office as to the character of said purchases, but reporting to the main

office at Davenport daily as to the amount of business transacted.

I further find that on September 16, 1930, Ernest Bell, Assistant Secretary of said The White-Phillips Co., Inc., in the ordinary course of business at the Chicago office, received a letter from one J. Connolly, dated at, St. Paul, Minnesota, September 13, 1930, which said letter is marked "White-Phillips Exhibit 1", and made a part of the record in this case, asking for a bid on 5000.00 Illinois Highway Bonds 4-S, dated 3-1-25, due 3-1-54; 3000 Illinois Highway Bonds 4-S, dated 3-1-25, due 3-1-46; that said bonds were not described or identified by number or otherwise; that after considerable negotiation the said Ernest Bell, Assistant Secretary of said The White-Phillips Co., Inc., sent a telegram, marked "Exhibit 5", offering 99½ for said bonds, being the current price therefor, which said offer was accepted by said Connolly, and thereupon the said Bell closed the transaction by accepting the offer in said telegram, under date of September 17, 1930, which said offer upon the same day was accepted by the said Connolly by telegram, marked "White-Phillips Exhibit 8", and made a part of the record herein.

52 I further find that on September 17, 1930, the day upon which the transaction for the purchase and sale of said bonds was closed and agreed upon, the said Connolly drew his draft on The White-Phillips Co., Inc., located at 39 S. LaSalle Street, Chicago, for the price of the bonds, in the sum of $7,975.12, attached the bonds to said draft and forwarded to the Transportation Bank in Chicago, (later the Congress Trust & Savings Bank) which were received by said Bank on September 22, 1930, and presented for payment to said The White-Phillips Co., Inc., at its Chicago office by a messenger of said Bank, which said draft was duly honored by said The White-Phillips Co., Inc., who issued a certified check for the sum of $7,975.12, and on September 22, 1930, said Congress Trust & Savings Bank remitted by telegraph to Connolly the proceeds of said draft, and thereupon said bonds were on the same day, to-wit: September 22, 1930, forwarded by the Chicago office of said The White-Phillips Co., Inc., to the Davenport office, the said bonds being received at said Davenport office on September 23, 1930.

I further find that between the dates of the theft of said bonds and their receipt at the office of said The White-Phillips Co., Inc., in Davenport, Iowa, on September 23, 1930, there had been received at said Davenport office, a copy of the

mimeographed circular entitled "Stolen Bonds"; that said notice entitled "Stolen Bonds" was received at said Davenport office of said The White-Phillips Co., Inc., in the usual course of business, and was placed upon a clip, which was termed "a catch-all for miscellaneous mail" by a clerk of said Company; that no one of the office force, clerks or executives of said Company examined the "junk" as it was
53 termed on the clip or file, and no one connected with the said The White-Phillips Co., Inc., examined said mimeographed circular entitled "Stolen Bonds", until after said bonds were received at the Davenport office of said The White-Phillips Co., Inc.

I further find from the evidence that the name of The White-Phillips Co., Inc., with its address at 39 S. LaSalle Street, in the City of Chicago, appeared upon the mailing list of said Foreman State Corporation, and its name also appeared upon a list known and described as "Very special municipal list"; that copies of said notice, entitled "Stolen Bonds" were mailed by said Foreman State Corporation to the said The White-Phillips Co., Inc., at its Chicago office, and also the main office at Davenport.

I further find that on the date the bonds were received at the Davenport office of said The White-Phillips Co., Inc., being September 23, 1930, Mr. Vernon Ehlers, a stenographer in the employ of said Company, examined said mimeographed circular entitled "Stolen Bonds", as filed on the clip in said office, and discovered that the bonds which had been purchased from said Connolly were listed on said circular entitled "Stolen Bonds", as being the property stolen from the said Ritchey V. Graham, and thereupon the said Ehlers immediately telephoned to the Chicago office of said Company and informed Mr. Bell, Assistant Secretary of said Company, that the bonds purchased from said Connolly were the same bonds as described upon said mimeographed notice entitled "Stolen Bonds", as sent out by the Foreman State Corporation, and upon receipt of this information the said Bell, Assistant Secretary in the Chicago Office of said Company, called said J. Connolly over the long distant 'phone, informing him of the situation, and that the bonds in question were
54 stolen, and on September 25, 1930, the said Connolly sent a telegram to said The White-Phillips Co., Inc., at its Chicago Office, declining to refund to the said The White Phillips Co., Inc., the purchase price of said bonds.

I further find that the policy of said The White-Phillips /

Co., Inc., in the handling of said notices received, either at the Chicago or Davenport offices of said Company, was of such a character that said notices were totally disregarded, and none of the clerks or office force of said Company were instructed to examine or refer to said notices of stolen securities; that the Executives of said Company considered all of said notices of like character as "junk", and that no system was followed in the handling of these notices, except in the Chicago office they were placed in a drawer with miscellaneous matters, and in the Davenport office were filed upon a clip, but no reference was made to them at any time to ascertain whether or not the securities which they were daily purchasing were listed on these notices as stolen.

55 FINDINGS AS TO THE LAW.

It appears to the Master that there are only two questions of law involved in this case—one, whether or not the said The White-Phillips Co., Inc., as a holder in due course under the Illinois Negotiable Instrument Act, had actual notice of the theft of said bonds; and second, whether the bonds, under the facts, were purchased in good faith.

The Illinois Negotiable Instrument Act defines "Who is a holder in due course": A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Cahill Illinois Revised Statutes, 1931, Chapter 98, Sec. 72.

The record discloses the fact that the said The White-Phillips Co., Inc., received said notice entitled "Stolen Bonds" at both its Chicago and Davenport office, but that no examination was made of said notices, and no consideration of the information as contained in said circular was given to it whatsoever, but on the other hand, totally and utterly disregarded.

The rule in Illinois is that the purchaser is bound by notice previously given him.

Northwestern National Bank of Milwaukee v. *Madison & Kedzie State Bank*, 242 Ill. App. page 22.

56 The Court said: "Under modern methods of doing business whereby ready reference may be had to such information thus furnished it, we cannot regard the knowledge thus once obtained by the proper agent to receive it, as being any less actual and binding because at the time of the negotiation of the solen securities it may have been overlooked or forgotten. Such a fact may be material as held in the case in 56 Barbour and references, where the element of bad faith alone is considered. But the statute makes the alternative of actual knowledge equally important, and it is not made subject to the condition of having been overlooked or forgotten. The difficulties of bringing actual knowledge to the several inmates of banks and brokerage offices, through whom the negotiation of such securities is most likely to be attempted, renders it highly desirable for the protection of innocent losers that the receipt of a special notice of this character by such banks or brokers in the regular course of business should be sufficient to put them on guard against aiding in the circulation of stolen negotiable securities."

Also citing *Childs* v. *Harris Trust & Savings Bank*, 27 Fed. (2nd Ed.) p. 633.

Rochester & Charlotte Turnpike Road Company v. *Paviour*, 164 N. Y., 281, 286.

At page 284, the Court says: "While he was not bound to be on the watch for facts which would put a very cautious man on his guard, he was bound to act in good faith. (*Second National Bank* v. *Weston*, 161 N. Y. 520, 526; *Cheever* v. *Pittsburgh, etc., R. R. Co.*, 150 N. Y., 59, 66). Even if his actual good faith is not questioned, if the facts known to him should have led him to inquire, and by inquiry he would have discovered the real situation, in a commencial sense he acted in bad faith and the law will withhold from him the protection that it would otherwise extend".

And at page 286: "One who suspects, or ought to suspect, is bound to inquire, and the law presumes that he knows whatever proper inquiry would disclose. While the courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith,

or with knowledge, actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint."

Hopper v. *Morgan*, 156 Fed. 525, 530:

"A person about to take a negotiable promissory note cannot willfully shut his eyes to information or means of information or knowledge which he knows are at hand. He cannot willfully evade knowledge which he knows, or has reasonable cause to think, would show a defect in the note or want of title. He must act in good faith, not in bad faith. Circumstances may be such as to impose an active duty or inquiry and investigation, and, if such duty is not performed, it may be conclusive evidence of bad faith; that is, the law may charge the party with knowledge which was at
57 hand, available, and to which he willfully shut his eyes; that is, he might have known the truth, ought to have known the truth, had good reason to suspect the truth, and did, but willfully refused to become fully acquainted with it. *Hazelhurst* v. *The Lulu*, 10 Wall. 192, 201, 19 L. Ed. 906; *Doe* v. *Northwestern Coal & Transportation Co.* (C. C.) 78 Fed. 62, 68; *Atlas National Bank* v. *Holm*, 71 Fed. 489, 491, 19 C. C. A. 94, affirmed in *Holm* v. *Atlas National Bank*, 84 Fed. 119, 28 C. C. A. 297."

Hallack v. *Young*, 72 N. H. 416, 419, 420, 57 Atl. 236, 238:

"It was said, in the leading case on the subject in this country, that 'every one must conduct himself honestly in respect to the antecedent parties when he takes negotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not willfully shut his eyes to the means of knowledge which he knows are at hand, * * * for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith'."

May v. *Chapman*, 16 M. & W. 355:

"Notice and knowledge mean not merely express notice, but knowledge or the means of knowledge to which the party willfully shuts his eyes—a suspicion in the minds of a party—and the means of knowledge in his power willfully disregarded.

If the party in good faith makes inquiry pursuant to his suspicion, when it is his duty to do so, and is even grossly negligent in so doing, if his failure be negligence only, how-

ever gross, he cannot be charged with knowledge or bad faith, but if he willfully fails to gain the information when it is at hand, and when it is his duty so to do, then he shows bad faith, for it is a willful evasion of knowledge for a purpose."

1 A. L. R. 717:

"But when it appears that the bonds have been stolen, a subsequent purchaser much show that he purchased in the ordinary course of business, in good faith, and for a valuable consideration. *Parsons* v. *Utica Cement Co.* (1909) 82 Conn. 333, 135 Am. St. Rep. 278, 73 Atl. 785; *Curry* v. *Wis.* 413, 136 N. W. 549."

Lord v. *Wilkinson*, 56 Barbour (N. Y.) 593:

"The good faith of the purchaser is a question for the jury where it was a bank, and it purchased the bonds without recognizing them as the ones to which a notice it had received referred, having in fact forgotten about the notice and the description of the bonds. *Lord* v. *Wilkinson* (1870) 56 Barb. (N. Y.) 593.

58 So, where there is evidence that the purchaser of stolen bonds had read a handbill giving information of the theft, and his testimony with reference to the matter was contradictory, his good faith was properly a question for the jury. *Lord* v. *Wilkinson* (1873) 2 Thomp. & C. (N. Y.) 179."

The true test is whether the transaction was entered into in ignorance of the bearer's want of title or any circumstances sufficient to put a reasonably cautious man on inquiry, the ignoring of which amounts to proof of bad faith.

Pratt v. *Higginson*, 230 Mass. 256.
119 N. E. 661, 1 A. L. R. 714.
Tollifsen v. *Middle States Investment Co.* 253 Ill. App. pages 323-324, including citations.

Sec. 76, Chapter 98, Cahill's Illinois Revised Statutes says that to constitute notice of infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

59 In view of the record in this case, the Master is of the opinion that the defendant, The White-Phillips Co., Inc., had actual knowledge that the bonds were stolen, and as a matter of law was therefore not a holder in due course, under the Illinois Negotiable Instrument Act.

Accordingly, I therefore find that the defendant, Ritchey V. Graham, is the legal holder and entitled to the possession of said Eight ($1,000.00) Illinois Highway Bonds, the subject matter of this case, which said bonds are numbered as follows: 2847, 2848, 2849, 18897, 18898, 18899, 18900 and 18901, with accrued interest thereon to date.

EDWARD P. ALLEN,
Master in Chancery, U. S. District Court, Southern District of Illinois, Southern Division.

Dated July 31st, 1933.

Filed August 10, 1933 S. T. Burnett, Clerk.

12. 60 And, afterwards, to wit: on the 12th day of August, A. D. 1933, there was filed in the office of the clerk of said court, certain exceptions to the report of the master, which said exceptions to said report was and is in the words and figures following, to wit:

61 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

EXCEPTIONS BY WHITE-PHILLIPS CO., INC., TO REPORT OF MASTER.

Exceptions taken by White-Phillips Company Inc., to the Report of Hon. Edward P. Allen, Master in Chancery, to whom the cause stands referred to take proof etc.

First. For that the Master finds (pages 7 and 10 of Report) that a copy of said notice entitled 'Stolen Bonds' was addressed and mailed to said The White-Phillips Co. Inc., at their Chicago office, and there is no competent evidence to support such finding.

Second, For that the Master omits to find that the evidence shows that the bonds were not registered, and also that the evidence shows that at the time they were purchased by White-Phillips Company, Inc., the bonds were unmatured and not past due.

Third, For that the Master omits to find that the evidence shows that before making an offer to Connolly for the bonds, and for the purpose of learning, as far as was possible and

customary in the trade, whether said Connolly was a regular dealer, White-Phillips Company Inc., consulted the recognized, standard publication "Security Dealers of North
62 America", issue of 1930 (Exhibit W. P. No. 2), and found said Connolly listed therein.

Fourth, For that the Master omits to find that the evidence shows that it would be a practical impossibility to do a bond business of the magnitude of that done by White-Phillips Company, Inc. and give attention to and carry in mind notices of the character of the notice in evidence.

Fifth, For that the Master finds (page 12 of Report)

"The record discloses the fact that the said White-Phillips Co. Inc., received said notice entitled 'Stolen Bonds' at both its Chicago and Davenport office",

whereas there is no competent evidence that such notice was received at the Chicago office, but the evidence shows the contrary.

Sixth, For that the Master finds (page 15 of Report)

"The the defendant, The White-Phillips Co. Inc. had actual knowledge that the bonds were stolen, and as a matter of law was therefore not a holder in due course, under the Illinois Negotiable Instrument Act",

Whereas the weight of the evidence is to the contrary, and that White-Phillips Company Inc., had no actual knowledge as this phrase is legally defined.

Seventh, For that the Master finds (page 15 of Report) that Richey V. Graham, is the legal holder and entitled to possession of said bonds.

Eighth, For that the findings and conclusions of the Master are based upon the minority (Illinois) rule of law, and not upon the majority (Federal) rule of law, and are contrary to the law as administered and interpreted by Federal Courts.

Ninth, For that the findings and conclusions of the Master are against the law and the evidence, in this, that the Master finds and holds that the mere receipt of the notice entitled "Stolen Bonds" imposed upon the White-Phillips Company Inc., the duty and obligation to carry the same in mind in the purchase of negotiable securities, and to be on guard against purchasing securities mentioned in such notice,
63 and not to overlook or disregard such notice, and holds that the purchase of such securities after the receipt of such notice, was a purchase not in good faith, which finding and holding, under the evidence, and under the law merchant

as interpreted and administered in the Federal Courts is erroneous, because under the law merchant as administered and interpreted in the Federal Courts, the mere receipt of such a notice imposes no such duty, but on the contrary, is that dealers in negotiable securities may purchase unmatured negotiable securities "without cumbering their minds or their offices with memoranda of such notices", (*Vermilye & Co.* v. *Adams Exp. Co.* 21 Wall. 139), and that mere proof of the delivery of such a notice at a banking house is not sufficient to charge the banker or dealer with actual notice or knowledge, or to impute to a purchaser after delivery of such notice absence of good faith.

Wherefore, in all of these particulars the said The White-Phillips Company, Inc., Excepts to said Report, and appeals therefrom to the judgment of the Court.

WILLIAM L. PATTON
Solicitor for the White-Phillips Company, Inc.

Filed August 12, 1933 S. T. Burnett, Clerk.

134 At the conclusion of the arguments of counsel upon the exceptions to the Master's report there was submitted to the court by Richey V. Graham, proposed findings of fact and conclusions of law, which said proposed findings of fact and conclusions of law, was in the words and figures, following, to wit:

135 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Part One—Findings of Fact.

The Court makes the following Findings of Fact herein:—

(1) That during all the time here involved Richey V. Graham, one of the respondents herein, was and now is a citizen of the State of Illinois and residing in the Village of Cicero, in the County of Cook in said State, and during all of said time The White-Phillips Company, Inc., the other of said respondents was and is a corporation, organized under

the laws of the State of Delaware, having its principal office in the City of Davenport, in the State of Iowa, and also having an office at No. 39 South LaSalle Street, in the City of Chicago, in the State of Illinois, and during all of said time the last said respondent was and still is engaged in the business of buying and selling state and municipal bonds and other securities.

(2) That this case involves the ownership of eight Illinois Highway Four Percent Bonds, the same being numbered 2847 to 2849 both inclusive, and 18897 to 18901 both inclusive, 136 together with certain interest coupons thereto attached, each of said bonds being in the principal sum of $1,000.00 and issued under and pursuant to the provisions of an Act of the General Assembly of the State of Illinois, entitled "An Act in relation to the construction by the State of Illinois of durable, hard-surfaced roads upon public highways of the State along designated routes, and the provision of means for the payment of the cost thereof by an issue of bonds of the State of Illinois", approved June 29, 1923 as amended (Pars. 198-1 to 198-10, Ch. 121, Cahill's Illinois Statutes—1923), and that said bonds are in form and in fact negotiable instruments.

(3) That on and before August 29, 1930 said bonds and attached coupons belonged to and were the property of the respondent Richey V. Graham, and that between said date and September 2nd, 1930, and while said respondent was absent from his said home in Cicero, Illinois, his house was burglarized by persons to the Court unknown, and the said bonds were stolen from said respondent.

(4) That immediately upon learning of the fact of such theft, that is to say on September 2nd, 1930, the said respondent Richey V. Graham gave notice thereof to Foreman State Corporation of Chicago, the same being a corporation with which said respondent sometimes transacted business; that very shortly thereafter said Foreman State Corporation prepared mimeographed typewritten notices of the theft of said bonds, the said notices being entitled in conspicuous characters at the top thereof "Stolen Bonds", and contained a description of said bonds, including the serial numbers thereof, and stated also that the same had lately been stolen from the then owner of the same, the respondent Richey V. Graham; that said notices were thereupon placed in the United States Mail, postage prepaid by said Foreman State

Corporation, addressed to various dealers in securities
137 of the character aforesaid; and that said notices were delivered through the mail in Chicago not later than September 5th, 1930.

(5) That on or about said 5th day of September A. D. 1930 one of said notices was received through the United States Mail by the respondent, The White-Phillips Company, Inc. at its Davenport office.

(6) That the Chicago office of said respondent The White-Phillips Company, Inc. was on the mailing list of said Foreman State Corporation, and that while it does not affirmatively appear that any such notice was ever received at said Chicago office, or that prior to the purchase of said bonds any search for any such notice was ever made by said respondent The White-Phillips Company, Inc. at such office, the finding is nevertheless warranted and is hereby made that one of such notices was in fact received through the United States Mail at said Chicago office of said respondent on or before April 5th, 1930.

(7) That on September 16, 1930 the said respondent The White-Phillips Company, Inc. at the Chicago office received a letter dated September 13, 1930 from one J. A. Connolly of St. Paul, Minnesota, offering to sell eight Illinois Highway bonds, the same, as now appears, being the same bonds involved herein. That defendant thereupon examined a publication entitled "Security Dealers of North America" and found the name of said J. A. Connolly listed therein as a dealer in securities of the character here involved; that thereupon by direction of its president Mr. Blair A. Phillips, who was then in said Chicago office, the said respondent on said 16th day of September A. D. 1930, through its said Chicago office sent to said J. A. Connolly an offer to purchase said bonds at the then market price of 99½; and this offer was accepted by said Connolly on said date. That said Connolly thereupon drew his draft on said respondent dated September 17, 1930 for the said purchase price in the total sum of
$7,952.12 and on said date sent said draft, with said bonds
138 attached to a Chicago bank for collection and delivery.

That said bonds and draft reached Chicago on September 22, 1933 and on that date the said respondent paid the amount of said draft and received possession of said bonds, which it thereupon forwarded to its Davenport office, and the said bonds arrived at the latter office on September 23, 1930.

(8) That aside from its examination of the aforesaid pub-

lication entitled "Security Dealers of North America" as hereinabove set forth no effort was at any time made by said respondent, either by consultation of the records in its office, or otherwise, to investigate or ascertain the title of said J. A. Connolly in and to said bonds, or his right to dispose of the same, or to discover whether or not said bonds had been stolen.

(9) That during all the time here involved, in the said Davenport office of said respondent The White-Phillips Company, Inc., there was a certain glass partition or cage separating the desks of the employees from the portion of said office used by the general public; that attached to said cage or the frame-work thereof was a certain metal device known as a hook or clip, placed at a height convenient to be seen by a person in a standing position, and that the purpose of said hook or clip among other things, was to hold and display notices of stolen securities of the character here involved, and thereby to enable the officers, employees and agents of said respondent to determine whether or not any securities offered for sale to said respondent had in fact been stolen; but that in said office no one of the employees, officers or agents of said respondent was charged with the duty of making any check upon the contents of such notices so received by said respondent, and no system for conveying or recording or preserving such information as might be contained in such notices and similar notices received at respondent's Chicago offices to the members of the office force of said respondent had ever put into effect.

139 (10) That when said bonds reached said Davenport office through the United States Mail on the 23rd day of September A. D. 1930, as aforesaid, the same, after being removed from the containing envelope by the employee having charge of the opening of the mail, were placed upon the desk of one Vernon Ehlers, the office Superintendent of said Davenport office; that said Ehlers after noting the receipt of said bonds, stepped to the glass cage or partition aforesaid and while standing there to sharpen a lead pencil at a sharpener located thereon, chanced to look at the aforesaid hook or clip, and he then observed thereon the aforesaid notice of the theft of said Illinois Highway Bonds; that said Ehlers then compared the description and numbers contained in said notice with the said bonds and found that they were the same; that he thereupon by long distance telephone informed said Blair Phillips, the president of said respondent, and who was

then in the said Chicago office, that the said bonds just received at said Davenport office had been stolen; that said Blair Phillips then further informed said Foreman State Corporation that said respondent had purchased the stolen bonds described in the notice aforesaid; and thereupon also the said Blair Phillips conveyed said information to said J. A. Connolly and on behalf of said respondent requested that said Connolly should repurchase said stolen securities, but this the said Connolly failed and refused to do.

(11) That under all the facts aforesaid, the respondent, The White-Phillips Company, Inc. as a corporate entity, at and before it purchased the aforesaid bonds had received actual notice that the same had been stolen from the said respondent Richey V. Graham, the true owner thereof; that at the time of such purchase said notice was being conspicuously displayed in the Davenport office of said respondent, The White-Phillips Company, Inc. on a device which had been previously placed in said office for the express purpose of receiving and displaying notices of that character; that said notice was in such position that nothing more than
140 a casual glance by a person standing in the vicinity thereof was required to convey information that the bonds here involved had been stolen; and that the faliure and neglect of said respondent to observe and learn the contents of such notice prior to the purchase of the securities here involved must be considered as amounting to wilful and conscious disregard of the rights of the true owner of said securities, the said Richey V. Graham, respondent herein.

Part Two—Conclusions of Law.

The court holds the following as Conclusions of Law herein:

(1) That the controversy herein is between citizens of different states, and exclusive of interest and costs, involves more than $3,000.00, and that therefore this court has jurisdiction of the parties hereto and of the subject matter hereof.

(2) That the eight Illinois Highway bonds here involved are negotiable instruments.

(3) That the transaction whereby said respondent, The White-Phillips Company, Inc. came into possession of the securities aforesaid, having occurred within the limits of the State of Illinois, comes within and is subject to the provisions of an Act of the State of Illinois entitled, "An Act in regard to negotiable instruments payable in money" approved June

5, 1907 as amended, and commonly known as the Negotiable Instruments Law of Illinois (Pars. 21-219 Chap. 98, Cahill's Illinois Statutes—1933).

(4) That the claim of said respondent, The White-Phillips Company, Inc. in and to said securities is subject to and will be determined by and according to the provisions of said Negotiable Instruments law of Illinois.

(5) That the construction of said Illinois Negotiable Instruments law, placed thereon by the highest courts of 141 Illinois will be accepted and followed in this Court.

(6) That under and by virtue of Sections 52 and 56 of said Illinois Negotiable Instruments law, as construed by the courts of Illinois, and as construed by this Court, where the true owner of stolen negotiable instruments sends through the United States Mail to a prospective purchaser, a notice accurately describing said instrument, and such notice is received by such prospective purchaser, the said prospective purchaser will be regarded as having such actual notice and knowledge of the facts contained in such notice as will prevent him from thereafter becoming, as to such securities, a holder in due course.

(7) That the respondent, The White-Phillips Company, Inc. by reason of having actually received, prior to its purchase of the securities here involved, a notice that the same had been stolen as hereinabove set forth, did not, by the purchase of said bonds, become a holder thereof in due course, but that at such time the said respondent had knowledge of such facts that its action in taking such securities amounted to bad faith.

(8) That wholly aside from the provisions of said Illinois Negotiable Instrument law, and having regard only to the general commercial law as construed by the United States Supreme Court, the said respondent, The White-Phillips Company, Inc. under the facts and circumstances herein, cannot be regarded as a holder in due course of the bonds here involved.

(9) That the equities in this cause are with the respondent, Richey V. Graham, and a decree should be entered accordingly.

Enter this ..... day of November, A. D. 1933.

Judge.

Filed November 25, 1933, S. T. Burnett, Clerk.

Nov. 25, 142 And afterwards, to wit: on the 25th day of November, A. D. 1933, there was filed in the office of the clerk of said court, in said cause, certain objections of White-Phillips Company, Inc., respondent to the proposed findings of fact submitted by Richey V. Graham, which said objections to said proposed findings of fact, is in the words and figures, following, to wit:

143 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

OBJECTIONS OF WHITE-PHILLIPS COMPANY, INC., RESPONDENT, TO PROPOSED FINDINGS OF FACT SUBMITTED BY RICHEY V. GRAHAM.

To the Hon. Charles G. Briggle, Judge of said Court:—

Certain proposed findings of fact to be made by the Court in the above cause, prepared by counsel for said Richey V. Graham, having been submitted to counsel for White-Phillips Company, Inc., objections are here made and taken to said proposed findings and request is made that the Court amend and modify said findings in the following particulars, that is to say:—

In Finding 6—Expunge the following words;—

"Or that any search therefor was ever made by said The White-Phillips Company, Inc., at such office"

and insert in lieu thereof, the following:—

"And it does appear that search therefor was made at said office after having there learned that said bonds had been stolen and that notice thereof had been received at the Davenport office, in all the places and files where such a notice would ordinarily be placed, and such search did not result in finding said notice".

144 In Finding 9—Expunge the following words:—

"To hold and display notices of stolen securities of the character herein involved, and thereby to enable the officers, employees and agents of said respondent to determine whether or not any securities offered for sale to said respondent had in fact been stolen".

Insert in lieu thereof:—

"That said hook or clip was used by the office boy who

opened the mail, for the purpose of holding a variety of circulars, notices and miscellaneous mail matter, among which were notices as to stolen securities, which were not distributed by the office boy to individuals in the office for attention, and there was no policy or custom in said office requiring any one in the office to pay any attention to the said hook or clip or anything it held, and no reference was ever made to the contents of the hook or clip before purchasing bonds".

In Finding 10 after the word "aforesaid" in line 8, insert the words "to sharpen a lead pencil at a sharpener located thereon".

Also insert as a separate and last paragraph of finding 10, or as a separate finding, the following:—

"Until said Ehlers saw the notice on the hook or clip, as above found, no officer, employee or agent of White-Phillips Company, Inc., either at Davenport or Chicago had read any such notice, and at the time of the purchase of the bonds, no officer, employee or agent of White-Phillips Company, Inc., either at Chicago or Davenport had actual or conscious or personal knowledge of said mimeographed circular or notice of the contents thereof, or actual or conscious or personal knowledge that the bonds had been stolen".

Expunge from finding 11 the words:—

"The White-Phillips Company, Inc., at and before it purchased the aforesaid bonds had received actual notice that the same had been stolen from the said Richey V. Graham, the true owner thereof".

145 For the reason that the same is (1) ambiguous in that the words "actual notice" are not defined, and it cannot be determined from said words whether the Court means to find that the receipt of the mimeographed notice at the Davenport office, under the evidence that the same was not read by or consciously known to any officer or agent either in said Davenport office or said Chicago office, was such "knowledge" as is referred to in Sec. 56 of the Negotiable Instruments Act of Illinois,

And Also

(2) That said language is not a finding of fact, but is an erroneous conclusion of law from facts previously found.

In Finding 11, Expunge the language:—

"That at the time of such purchase said notice was being conspicuously displayed in the Davenport office of said respondent, The White-Phillips Company, Inc., on a device

which had been previously placed in said office for the express purpose of receiving and displaying notice of that character".

Insert in lieu thereof the language:—

"That at the time of such purchase the said mimeographed notice was on the hook or clip described in Finding No. 9".

In Finding 11, also Expunge the language:—

"And the failure and neglect of respondent to observe and learn the contents of said notice prior to the purchase of the securities here involved must be considered as amounting to a wilful and conscious disregard of the rights of the true owner of said securities, and said Richey V. Graham, respondent herein."

For the reason (1) that such language is not a finding of fact but a conclusion of law, and (2) as a conclusion of either law of fact the same is erroneous, not justified by the evidence, and an incorrect legal inference from the facts as found under the rules of law applicable thereto.

146 And in addition to the foregoing amendments and modifications, this respondent requests the Court to make a finding of fact, in substance, as follows:—

"The only notice which The White-Phillips Company, Inc., respondent, had at the time of the purchase of said bonds of the fact that there was a defect in the title of the person negotiating the same, is that notice to the corporate entity which may be inferred from the fact of the receipt of and handling of the said mimeographed notice".

All of which is respectfully submitted,

WHITE PHILLIPS COMPANY, INC.,
Respondent.

By WILLIAM L. PATTON,
WINSTON, STRAWN & SHAW,
Its Solicitors.

147 OBJECTIONS OF WHITE-PHILLIPS COMPANY, INC., RESPONDENT, TO PROPOSED CONCLUSIONS OF LAW SUBMITTED BY RICHEY V. GRAHAM.

To the Hon. Charles G. Briggle, Judge of said Court.

Certain proposed conclusions of law to be made by the Court in the above cause, prepared by counsel for Richey V. Graham, having also been submitted to counsel for the White-

Phillips Company, Inc., objections are here made and taken to said conclusions, and request is made that the Court amend and modify said conclusions in the following particulars, that is to say:—

In Conclusion No. 3, after the parenthetical clause at the end thereof, change the period to a comma, and insert the following:

"As Sections 52, 55, 56, 57 and 59 of the Uniform Negotiable Instruments Act, of which the said Illinois Act is an adoption, are construed by the Federal Courts".

In Conclusion No. 3, after the word "Illinois", change the period to a comma, and insert the following:

"Which is an adoption of the Uniform Negotiable Instruments Act, as Sections 52, 55, 56 57 and 59 of the said Act are construed in the Federal Courts".

In Conclusion No. 5, after the word "Court", change the period to a comma and insert the following:—

148 "Except insofar as the said Act is merely a statutory restatement of the law merchant, and as to such portions of the Act as are restatement of the law merchant, this Court will not accept and follow the Court of Illinois, but will follow the rule and construction adopted by the Federal Courts".

Expunge entirely Conclusion No. 6 as presented and in lieu thereof insert as Conclusion No. 6 the following:—

"That under and by virtue of the law merchant, as adopted in Sections 52 and 56 of said Illinois Negotiable Instruments Act, as construed and administered by the Federal Courts, a purchaser of stolen negotiable instruments before due for a valuable consideration from the thief or one who procured the same from the thief without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title That result can be produced only by bad faith on the part of the taker.

149 The Court also concludes that the mere proof of receipt by a dealer in negotiable securities of a written or printed notice, such as the mimeographed notice in evidence in this case, is not, alone, sufficient to establish bad faith. Such dealers in negotiable securities may purchase such pa-

per before due, without cumbering their minds or offices with the memoranda of such notices".

Expunge entirely Conclusion No. 7, and in lieu thereof insert the following:—

"That the proof of the receipt of the said mimeographed notice by The White-Phillips Company, Inc., and the handling thereof as found by the Court in its finding of facts, is not, in and of itself, without more, sufficient to establish bad faith in the taking of said securities".

Expunge entirely Conclusion No. 8 and insert in lieu thereof, the following:—

"Under the law merchant and said sections of the Illinois Negotiable Instruments Law, as construed and administered in the Federal Court, proof that the securities had been stolen throws the burden of establishing good faith upon the purchaser of the securities.

"The Court, having found as a fact that at the time of the purchase of the securities by the White-Phillips Company, Inc., no officer, agent or employee of said corporation had actual or conscious knowledge of the fact that such se-
150 curities had been stolen, the Court therefore concludes as a matter of law, that The White-Phillips Company, Inc., has carried the burden of establishing its good faith, and is the holder in due course of the said bonds".

Expunge entirely Conclusion No. 9.

All of which is respectfully submitted.

WHITE-PHILLIPS COMPANY, INC.
By WILLIAM L. PATTON
WINSTON STRAWN & SHAW,
Its Solicitors.

EXCEPTIONS.

In the event that the Court shall overrule the foregoing objections of The White-Phillips Company, Inc., to said proposed findings of fact and conclusions of law, tendered and requested by Richey V. Graham, and shall deny and refuse the above requests of The White-Phillips Company, Inc., for changes, modifications and amendments and additions thereto in the particulars above set forth, The White Phillips Company, Inc., excepts to such orders and rulings of the Court and prays that its exception to each such ruling of the Court

adverse to said objections and requests be allowed and made a part of the record herein.

Respectfully submitted
THE WHITE-PHILLIPS COMPANY, INC.,
By WILLIAM L. PATTON
WINSTON, STRAWN & SHAW,
Its Solicitors.

Filed Nov. 25, 1933 S. T. Burnett, Clerk.

151 And afterwards, to wit: on the 1st day of December, A. D. 1933, the following further proceedings were had in said court in said cause and were entered of record, to wit: Filed 193

152 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Findings of Fact.

The Court makes the following Findings of Fact herein:—

(1) That during all the time here involved Richey V. Graham, one of the respondents herein, was and now is a citizen of the State of Illinois and residing in the Village of Cicero, in the County of Cook in said State, and during all of said time The White-Phillips Company, Inc., the other of said respondents was and is a corporation, organized under the laws of the State of Delaware, having its principal office in the City of Davenport, in the State of Iowa, and also having an office at No. 39 South LaSalle Street, in the City of Chicago, in the State of Illinois, and during all of said time the last said respondent was and still is engaged in the business of buying and selling state and municipal bonds and other securities.

(2) That this case involves the ownership of eight Illinois Highway Four Percent Bonds, the same being numbered 2847, to 2849 both inclusive, and 18897 to 18901 both inclusive, together with certain interest coupons thereto attached, each of said bonds being in the principal sum of

$1,000.00 and issued under and pursuant to the provi-
153 sions of an Act of the General Assembly of the State of Illinois, entitled "An Act in relation to the construction by the State of Illinois of durable, hard-surfaced roads upon public highways of the State along designated routes, and the provisions of means for the payment of the cost thereof by an issue of bonds of the State of Illinois", approved June 29, 1923 as amended (Pars. 198-1 to 198-10, Ch. 121, Cahill's Illinois Statutes—1923) and that said bonds are in form and in fact negotiable instruments.

(3) That on and before August 29, 1930, said bonds and attached coupons belonged to and were the property of the respondent Richey V. Graham, and that between said date and September 2nd, 1930, and while said respondent was absent from his said home in Cicero, Illinois, his house was burglarized by persons to the Court unknown, and the said bonds were stolen from said respondent.

(4) That immediately upon learning of the fact of such theft, that is to say on September 2nd, 1930, the said respondent Richey V. Graham gave notice thereof to Foreman State Corporation of Chicago, the same being a corporation with which said respondent sometimes transacted business; that very shortly thereafter said Foreman State Corporation prepared mimeographed typewritten notices of the theft of said bonds, the said notices being entitled in conspicuous character at the top thereof "Stolen Bonds", and contained a description of said bonds, including the serial numbers thereof, and stated also that the same had lately been stolen from the then owner of the same, the respondent Richey V. Graham; that said notices were thereupon placed in the United States Mail, postage prepaid by said Foreman State Corporation, addressed to various dealers in securities of the character aforesaid; and that said notices were delivered through the mail in Chicago not later than September 5th, 1930; that the Chicago Office of the White-Phillips Company, Inc., was on the mailing list of said Foreman State Corporation.

(5) That on or about said 5th day of September,
154 A. D. 1930 one of said notes was received through the United States mail by the respondent, The White-Phillips Company, Inc., at its Davenport office.

(6) That on September 16, 1930, the said respondent The White-Phillips Company, Inc., at its Chicago office received a letter dated September 13, 1930 from one J. A. Connolly

of St. Paul, Minnesota, offering to sell eight Illinois Highway bonds, the same, as now appears, being the same bonds involved herein. That defendant thereupon examined a publication entitled "Security Dealers of North America" and found the name of said J. A. Connolly listed therein as a dealer in securities of the character here involved; that thereupon by direction of its president Mr. Blair A. Phillips, who was then in said Chicago office, the said respondent on said 16th day of September A. D. 1930, through its said Chicago office sent to said J. A. Connolly an offer to purchase said bonds at the then market price of 99½; and this offer was accepted by said Connolly on said date. That said Connolly thereupon drew his draft on said respondent dated September 17, 1930, for the said purchase price in the total sum of $7,952.12 and on said date sent said draft, with said bonds attached to a Chicago bank for collection and delivery. That said bonds and draft reached Chicago on September 22, 1933, and on that date the said respondent paid the amount of said draft and received possession of said bonds, which it thereupon forwarded to its Davenport office, and the said bonds arrived at the latter office on September 23, 1930.

(7) That aside from its examination of the aforesaid publication entitled "Security Dealers of North America" as hereinabove set forth no effort was at any time made by said respondent, either by consultation of the records in its office, or otherwise, to investigate or ascertain the title of said J. A. Connolly in and to said bonds, or his right to dispose of the same, or to discover whether or not said bonds had been stolen.

(8) That during all the time here involved, in the
155 said Davenport office of said respondent The White-Phillips Company, Inc., there was a certain glass partition or cage separating the desks of the employees from the portion of said office used by the general public; that attached to said cage or the frame-work thereof was a certain metal device known as a hook or clip, placed at a height convenient to be seen by a person in a standing position, and that the purpose of said hook or clip among other things was to hold and display notices of stolen securities of the character here involved; but that in said office no one of the employees, officers or agents of said respondent was charged with the duty of making any check upon the contents of such notices so received by said respondent, and no system for conveying or recording or preserving such information as

might be contained in such notices and similar notices received at respondent's Chicago offices to the members of the office force of said respondent had ever been put into effect.

That said hook or clip was used by the office boy who opened the mail, for the purpose of holding a variety of circulars, notices as to stolen securities, which were not distributed by the office boy to individuals in the office for attention, and there was no policy or custom in said office requiring any one in the office to pay any attention to the said hook or clip or anything it held.

(9) That when said bonds reached said Davenport office through the United States Mail on the 23rd day of September A. D. 1930, as aforesaid, the same, after being removed from the containing envelope by the employee having charge of the opening of the mail, were placed upon the desk of one Vernon Ehlers, the office Superintendent of said Davenport office; that said Ehlers after noting the receipt of said bonds, stepped to the glass cage or partition aforesaid and while standing there to sharpen a lead pencil at a sharpener located thereon, chanced to look at the aforesaid hook or clip, and he then observed thereon the aforesaid notice of the
156 theft of said Illinois Highway bonds; that said Ehlers then compared the description and numbers contained in said notice with the said bonds and found that they were the same; that he thereupon by long distance telephone, informed said Blair Phillips, the president of said respondent, and who was then in the said Chicago office, that the said bonds just received at said Davenport office had been stolen; that said Blair Phillips then further informed said Foreman State Corporation that said respondent had purchased the stolen bonds described in the notice aforesaid; and thereupon also the said Blair Phillips conveyed said information to said J. A. Connolly and on behalf of said respondent requested that said Connolly should repurchase said stolen securities, but this the said Connolly failed and refused to do.

That until said Ehlers saw the notice on the hook or clip, as above found, none of the officers, employees or agents of the White-Phillips Company, Inc., who testified in this case, had read such notice.

(10) That the respondent, The White-Phillips Company, Inc., as a corporate entity, at and before it purchased the aforesaid bonds had, by virtue of the notice so received at its Davenport Office, received actual notice that the same had been stolen from the said respondent Richey V. Graham, the

true owned thereof; that at the time of such purchase the said mimeograph notice was on the hook or clip hereinbefore referred to; that said notice was in such position that nothing more than a casual glance by a person standing in the vicinity thereof was required to convey information that the bonds here involved had been stolen; and that the failure and neglect of said respondent to observe and learn the contents of such notice prior to the purchase of the securities here involved must be considered as amounting to a wilful and conscious disregard of the rights of the true owners of said securities, the said Richey V. Graham, respondent herein.

157 Conclusions of Law.

The Court holds the following as Conclusions of Law herein:—

(1) That the controversy herein is between citizens of different states, and exclusive of interest and costs, involves more than $3,000.00 and that therefore this Court has jurisdiction of the parties hereto and of the subject matter hereof.

(2) That the eight Illinois Highway bonds here involved are negotiable instrument.

(3) That the transaction whereby said respondent, The White-Phillips Company, Inc., came into possession of the securities aforesaid, having occurred within the limits of the State of Illinois, comes within and is subject to the provisions of an Act of the State of Illinois entitled, "An Act in regard to negotiable instruments payable in money" approved June 5, 1907 as amended, and commonly known as the Negotiable Instruments Law of Illinois (Pars. 21-219 Chap. 98, Cahill's Illinois Statutes—1933).

(4) That the claim of said respondent, The White-Phillips Company, Inc., in and to said securities is subject to and will be determined by and according to the provisions of said Negotiable Instruments law of Illinois.

(5) That the respondent, The White-Phillips Company, Inc. by reason of having actually received, prior to its purchase of the securities here involved, a notice that the same had been stolen as hereinabove set forth, did not, by the purchase of said bonds, become a holder thereof in due course, but that at such time the said respondent had knowledge of

such facts that its action in taking such securities amounted to bad faith.

(6) That the equities in this cause are with the respondent Richey V. Graham, and a decree should be entered accordingly.

Enter this 1st day of December, A. D. 1933.

CHAS. G. BRIGGLE
Judge.

Filed Dec. 1, 1933 S. T. Burnett, Clerk.

158 And afterwards, to wit: on the 1st day of December, A. D. 1933, there was filed in the office of the clerk of said court, certain exceptions by the White-Phillips Company, Inc., to the findings of fact by the court, which said exceptions to said findings of fact is in the words and figures, following, to wit:

159 IN THE DISTRICT COURT OF THE UNITED STATES

(Caption)

EXCEPTIONS BY THE WHITE-PHILLIPS COMPANY, INC., TO FINDINGS OF FACT BY THE COURT.

Now Comes The White-Phillips Company, Inc., and excepts to the findings of fact made by the Court in the following particulars, that is to say:—

I.

Exception is taken to the refusal of the Court to find as requested by The White-Phillips Company, Inc.

"At the time of the purchase of the bonds, no officer, employee or agent of The White-Phillips Company, Inc., either at Chicago or Davenport had actual or concious or personal knowledge of said mimeographed circular, or notice of the contents thereof, or actual or conscious or personal knowledge that the bonds had been stolen".

II.

Exception is taken to finding No. 10, insofar as it contains the conclusion that The White-Phillips Company, Inc., "re-

ceived actual notice that the same had been stolen", and also the conclusion,

160 "That the failure and neglect of said respondent to observe and learn the contents of such notice prior to the purchase of the securities here involved must be considered as amounting to a wilful and conscious disregard of the rights of the true owners of said securities".

For that such conclusions and each of them are not findings of fact, but are erroneous conclusions of law, and for that the evidence wholly fails to support such findings either as to fact or of law.

IV

Exception is taken to the refusal of the Court to find, as requested by The White-Phillips Company, Inc.,

"The only notice which The White-Phillips Company, Inc., respondent, had at the time of the purchase of said bonds of the fact that there was a defect in the title of the person negotiating the same, is that notice to the corporate entity which may be inferred from the fact of the receipt of and handling of said mimeographed notice".

WILLIAM L. PATTON,
WINSTON, STRAWN & SHAW,
Solicitors for The White Phillips Company, Inc.

161 EXCEPTIONS BY THE WHITE-PHILLIPS COMPANY, INC., TO CONCLUSIONS OF LAW BY THE COURT.

Now Comes The White-Phillips Company, Inc., and excepts to the conclusions of law made by the Court in the following particulars:—

I.

Exception is taken to conclusion No. 5,

"That the respondent The White-Phillips Company, Inc., by reason of having actually received, prior to its purchase of the securities here involved a notice that the same had been stolen as hereinabove set forth, did not, by the purchase of said bonds, become a holder thereof in due course, but that

at such time the said respondent had knowledge of such facts that its action in taking such securities amounted to bad faith".

II.

Exception is taken to Conclusion No. 6,

"That the equities in this cause are with the Respondent Richey V. Graham, and a decree should be entered accordingly".

III.

Exception is taken to the refusal of the Court to adopt the conclusions of law those conclusions proposed and requested by The White-Phillips Company, Inc., and specifically to the failure to conclude in essence and substance as follows:—

162 "That under and by virtue of the law merchant, as adopted in Sections 52 and 56 of said Illinois Negotiable Instruments Act, as construed and administered by the Federal Courts, a purchaser of stolen negotiable instruments before due for a valuable consideration from the thief or one who procured the same from the thief without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on the part of the taker.

The Court also concludes that the mere proof of receipt by a dealer in negotiable securities of a written or printed notice, such as the mimeographed notice in evidence in this case, is not, alone, sufficient to establish bad faith. Such dealers in negotiable securities may purchase such paper before due, without cumbering their minds or offices with the memoranda of such notices".

That the proof of the receipt of the said mimeographed notice by The White-Phillips Company, Inc., and the handling thereof as found by the Court in its finding of facts, is not, in and of itself, without more, sufficient to establish bad faith in the taking of said securities".

Under the law merchant and said sections of the Illinois Negotiable Instruments Law, as construed and administered in the Federal Courts, proof that the securities had been

stolen throws the burden of establishing good faith upon the purchaser of the securities".

The Court, having found as a fact that at the time of the purchase of the securities by The White-Phillips Company, Inc., no officer, agent or employee of said corporation had actual or conscious knowledge of the fact that such securities had been stolen, the Court therefore concludes as a matter of law, that The White-Phillips Company, Inc., has carried by the burden of establishing its good faith, and is the holder in due course of the said bonds":

WILLIAM L. PATTON,
WINSTON, STRAWN & SHAW,
Solicitors for The White-Phillips Company, Inc.

Filed, December 1, 1933 S. T. Burnett, Clerk

163 And afterwards, to wit: on the 1st day of December, A. D. 1933, the following further proceedings were had in said court in said cause and were entered of record to wit: Entered 1933.

164 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption) * *

DECREE.

This Cause came on to be heard at this term and was argued by counsel; thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:—

(1) That the exceptions filed by the respondent The White-Phillips Company, Inc. to the Report of Edward P. Allen, Master in Chancery to whom this cause was hitherto referred, be and the same are hereby overruled.

(2) That the respondent Richey V. Graham, is the legal and equitable owner of the securities involved herein, the same being eight Illinois Four Percent Highway bonds numbered 2847 to 2849 both inclusive, and 18897 to 18901 both inclusive, each in the principal sum of One Thousand Dollars ($1,000.00), together with certain interest coupons thereto attached, evidencing all interest maturities accruing on and after March 1, 1931; and that the respondent The White-Phillips Company, Inc. as against the claim of the said re-

spondent Richey V. Graham, has no right, title or interest in said securities or any or either of them.

165 (3) That within thirty days from the entering of this decree the said respondent, The White-Phillips Company, Inc. shall, and it is hereby ordered to, turn over and deliver to said respondent Richey V. Graham the said eight Illinois Highway bonds and attached coupons.

(4) Either party may apply to this Court at the foot of this decree for further directions for the purpose of carrying out and enforcing the provisions hereof or otherwise.

It Is Further Ordered, Adjudged And Decreed by the Court that the said respondent, The White-Phillips Company, Inc. shall pay the costs of this proceeding, and that in case the said respondent shall make default in making any of the payments herein ordered and adjudged against it, execution shall issue therefor.

And the said respondent The White-Phillips Company, Inc. prays exceptions to the foregoing order and decree and each and every part thereof, and which said exceptions are hereby allowed.

Enter this 1st day of December, A. D. 1933.

CHAS. G. BRIGGLE
Judge

Filed December 1, 1933. S. T. Burnett, Clerk.

166 And afterwards, to wit: on the 28th day of December, A. D. 1933, there was filed in the office of the clerk of said court, a certain petition by the respondent The White-Phillips Company, Inc. for appeal, which said petition was and is in the words and figures, following, to wit:

167 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption) * *

PETITION FOR APPEAL.

Filed December 28, 1933.

To the Honorable Charles G. Briggle, Judge of the said Court;—

Your Petitioner, The White-Phillips Company, Inc., who is one of the parties interpleading under the order to inter-

plead entered in the above entitled cause, prays that it may be permitted to take an appeal from the decree entered in the above cause on the First day of December, 1933, to the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons specified in the assignment of errors which is filed herewith.

And Your Petitioner desires that said appeal shall operate as a supersedeas, and therefore prays that an order be made fixing the amount of security which said The White-Phillips Company, Inc., shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this Court be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals for the Seventh Circuit.

Dated this 28th day of December, 1933.

WILLIAM L. PATTON,
WINSTON, STRAWN & SHAW,
Attorneys for The White-Phillips Company, Inc.

168 And afterwards, to wit: on the 28th day of December, A. D. 1933, there was filed in the office of the clerk of said court, a certain assignment of errors was and is in the words and figures, following, to wit: Filed D 1933.

169 IN THE DISTRICT COURT OF TH[illegible]ITED STATES

* * (Caption) * *

ASSIGNMENT OF ERRORS.

Comes Now the said The White-Phillips Company, Inc., one of the parties interpleading under the order to interplead entered in the above entitled cause, now appellant, and files the following assignment of errors upon which appellant will rely in the prosecution of the appeal herewith petitioned for in said cause, from the decree of this Court entered on the First day of December, 1933.

1.—The Court erred in not sustaining the first, third, fourth, fifth, sixth, seventh, eighth and ninth exceptions by The White-Phillips Company, Inc., appellant, to those parts of the report made in this cause by the Master in Chancery,

under the order of reference made the 19th day of January 1932, to which rulings and each of them exceptions was taken by appellant at the time.

2.—The Court erred in confirming said Report of the Master in Chancery.

3.—The Court erred in refusing to find as facts the fact as proposed and suggested by appellant in its objections to the finding proposed by Richey V. Graham as Finding 9, in that appellant requested the Court to find "That said hook or clip was used by the office boy who opened the mail for the purpose of holding a variety of circulars, notices and miscellaneous mail matter, among which were notices as to stolen securities."

170 4.—The Court erred in refusing to find as a fact the fact as proposed and suggested by appellant in its objection to Finding 10 as proposed by Richey V. Graham.

5.—The Court erred in refusing to incorporate in his findings of fact a finding requested by appellant as follows:—

"At the time of the purchase of the bonds, no officer, employee or agent of The White-Phillips Company, Inc., either at Chicago or Davenport had actual or conscious or personal knowledge of said mimeographed circular, or notice of the contents thereof, or actual or conscious or personal knowledg that the bonds had been stolen."

6.—The Court erred in finding in his Finding No. 10 that appellant "Received actual notice that the same had been stolen" and also

"That the failure and neglect of said respondent to observe and learn the contents of such notice prior to the purchase of the securities here involved must be considered as amounting to a wilful and conscious disregard of the rights of the true owners of said securities".

7.—The Court erred in refusing to find as requested by appellant

"The only notice which The White-Phillips Company, Inc., respondent, had at the time of the purchase of said bonds of the fact that there was a defect in the title of the person negotiating the same, is that notice to the corporate entity which may be inferred from the fact of the receipt of and handling of said mimeographed notice".

8.—The Court erred in concluding the law to be as set forth in the Court's Conclusion No. 5.

171 9.—The Court erred in concluding the law to be as set forth in the Court's Conclusion No. 6.

10.—The Court erred in refusing to adopt as his conclusions of law those conclusions proposed and requested by The White-Phillips Company, Inc., and specifically to the failure to conclude in essence and substance as follows:—

"That under and by virtue of the law merchant, as adopted in Sections 52 and 56 of said Illinois Negotiable Instruments Act, as construed and administered by the Federal Courts, a purchaser of stolen negotiable instruments before due for a valuable consideration from the thief or one who procured the same from the thief without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or grose negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on the part of the taker.

The Court also concludes that the mere proof of receipt by a dealer in negotiable securities of a written or printed notice, such as the mimeographed notice in evidence in this case, is not, alone, sufficient to establish bad faith. Such dealers in negotiable securities may purchase such paper before due, without cumbering their minds or offices with the memoranda of such notices".

That the proof of the receipt of the said mimeographed notice by The White-Phillips Company, Inc., and the handling thereof as found by the Court in its finding of facts, is not, in and of itself, without more, sufficient to establish bad faith in the taking of said securities".

Under the law merchant and said sections of the Illinois Negotiable Instruments Law, as construed and administered in the Federal Courts, proof that the securities had been stolen throws the burden of establishing good faith upon the purchaser of the securities".

172 The Court, having found as a fact that at the time of the purchase of the securities by The White-Phillips Company, Inc., no officer, agent or employee of said corporation had actual or conscious knowledge of the fact that such securities had been stolen, the court therefore concludes as a matter of law, that The White-Phillips Company, Inc., has carried by the burden of establishing its good faith, and is the holder in due course of the said bonds."

11. The Court erred in failing and refusing to conclude upon the evidence that The White-Phillips Company, Inc., by

its purchase of said bonds became and was a holder in good faith and for value and without actual knowledge of any infirmity or defect in the title of the person negotiating the same, or knowledge of such facts that its action in taking the bonds amounted to bad faith.

173 12.—The Court erred in entering a decree in favor of Richey V. Graham and against The White-Phillips Company, Inc.

13.—The Court erred in decreeing by paragraph 2 of the decree that Richey V. Graham is the legal and equitable owner of the securities, and that appellant, as against the claim of Richey V. Graham has no right, title or interest in said securities.

14.—The Court erred in decreeing by paragraph 3 that appellant shall turn over to Richey V. Graham the said securities.

15.—The Court erred in adjudging and decreeing that appellant shall pay the costs of the proceeding, and erred in decreeing execution against appellant.

Wherefore, The White-Phillips Company, Inc., prays that the said decree may be reversed and for such other and further relief as to the Court may seem just and proper.

WILLIAM L. PATTON
WINSTON STRAWN & SHAW
Attorneys for The White-Phillips Company, Inc., Appellant.

Filed December 28, 1933. S. T. Burnett, Clerk.

Dec. 28. 174 *And afterwards, to wit: on the 28th day of December*, A. D. 1933, the following further proceedings were had in said court in said cause and were entered of record, to wit:

175 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption) * *

ORDER ALLOWING APPEAL.

Now on this day came The White-Phillips Company, Inc., party interpleading in the above entitled cause and presented its petition for appeal from the decree heretofore entered

against it on December 1st, 1933, and presented also its assignment of errors.

And on reading the said petition, and on consideration of the assignment of errors;

It Is Ordered that an appeal herein be allowed as prayed for,

And It Is Further Ordered that a certified transcript of the record and all proceedings be transmitted to the United States Circuit Court of Appeals for the Seventh Circuit.

It Is Further Ordered that the bond on appeal be fixed at the sum of Twelve Thousand Dollars, and that said bond shall be a supersedeas as well as a cost bond.

Dated this 28th day of December, 1933.

Enter:

CHAS. G. BRIGGLE
Judge.

Filed December 28, 1933 S. T. Burnett, Clerk.

176 And afterwards, to wit: on the 19th day of January, A. D. 1934, there was filed in the office of the clerk of said court, a certain Appeal Bond, which said Appeal Bond was and is in the words and figures, following, to wit: Filed Ja 1934.

177 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

BOND ON APPEAL.

Know All Men By These Presents, that we, The White-Phillips Company, Inc., a corporation, as principal, and Globe Indemnity Company, as surety, are held and firmly bound unto Richey V. Graham in the full and just sum of Twelve Thousand Dollars, to be paid to the said Richey V. Graham, his heirs, executors, administrators, successors, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, and severally by These Presents.

Sealed with our seals and dated this 18th day of January, 1934.

Whereas, lately at the June 1933 Term of the United States District Court for the Southern District of Illinois, Southern Division, in a suit there depending, between The

White-Phillips Company, Inc., interpleading with Richey V. Graham, a decree was rendered against The White-Phillips Company, Inc., at the said Term of the said Court and the said The White-Phillips Company, Inc., has petitioned for and been allowed by said United States District Court an appeal to the United States of Appeals for the Seventh Cir-
178 cuit, and a citation has been issued directed to the said Richey V. Graham, citing him to appear in the United States Circuit Court of Appeals for the Seventh Circuit at Chicago, Illinois, thirty days from and after the date of such citation;

Now the Condition of the above obligation is such that if the said The White-Phillips Company, Inc., shall prosecute said appeal with effect, and answer all damages and costs if it fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

THE WHITE-PHILLIPS COMPANY, INC. (SEAL)
By BLAIR A. PHILLIPS
Its President.

Attest:

ERNEST E. BELL
Assistant Secretary.

GLOBE INDEMNITY COMPANY
By T. P. CUNNINGHAM,
(Seal) *Attorney in Fact.*

179 State of Illinois } ss.
County of Cook }

I, Frances Wardman, a Notary Public in and for said County, in the State aforesaid, do hereby certify that T. P. Cunningham of the Globe Indemnity Company, who is personally known to me, appeared before me this day and acknowledged that he signed, sealed and delivered the foregoing instrument as his free and voluntary act as Attorney-in-fact of the Globe Indemnity Company, and as the free and voluntary act of the Globe Indemnity Company, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 18th day of January, A, D. 1934.

FRANCES WARDMAN
(Seal) *Notary Public.*

180 State of Illinois }
County of Cook }

Be It Remembered, that on the 18th day of January, 1934, before me a Notary Public in and for the County of Cook, State of Ill., personally appeared Blair A. Phillips, President of The White-Phillips Company, Inc., a corporation, and Ernest E. Bell, its assistant Secretary, who are personally known to me to be the same persons who executed the annexed instrument in writing, and they, being duly sworn, depose and say that they were personally present at the execution of the foregoing instrument and saw the common seal of said Company duly affixed thereto, and that the seal so affixed is the common seal of said Company, and that said instrument was signed, sealed and delivered by them as and for the act and deed of said Company, for the uses and purposes therein mentioned, and that the names of these deponents subscribed, respectively to said instrument as President and Secretary of said Company in attestation of the due execution and delivery of the said instrument, are in these deponents' respective handwriting.

In Witness Whereof, I have hereunto set my hand and seal the day and year first above written.

ROSE M. LEONI
(Seal) *Notary Public.*

181 POWER OF ATTORNEY FROM GLOBE INDEMNITY COMPANY.

Certified Copy

Know All Men By These Presents: That the Globe Indemnity Company, a New York Corporation, having its principal office in the City, County and State of New York, pursuant to the following By-Law, which was adopted by the Directors of the said Company, on February 11, 1931, to-wit:

Article V, Section I, Provides "The President, any Vice President, or any other Officer designated by the Board shall have power and authority to appoint Resident Vice-President, Resident Secretaries, Resident Assistant Secretaries, and Attorneys in fact, and to give such appointees full power and authority to sign, and to seal with the Company's seal, where required, all policies, bonds, recognizances, stipula-

tions and all underwriting undertakings, and he may at any time in his judgment remove any such appointees and revoke any authority given to them." does hereby nominate, constitute and appoint M. Gordon Grahame, T. P. Cunningham, M. W. Haupt, Stephen P. Armstrong, Freeman C. Read, Edw. J. Halleman, L. W. Zuttermoister, and T. M. Anderson, all of Chicago, Illinois, its true and lawful agents and attorneys in-fact, to make, execute, seal and deliver for and on its behalf, and as its act and deed, as surety, any and all bonds, undertakings and recognizances (including oral and Open Court recognizances within the meaning of the Attachment and Garnishee Acts of Illinois) in its business of guaranteeing the fidelity of persons holding places of public or private trust and guaranteeing the performance of con-
182 tracts (other than insurance policies), and bonds and undertakings required or permitted in all actions or proceedings or by law required or permitted, including bonds or undertakings given to secure delivery of shipments without surrender of Bill of Lading and/or to secure payment of freight cargoes, to be signed for the Company and the Seal of the Company attached thereto by the said M. Gordon Grahame, alone, or by the said T. P. Cunningham, jointly with any one of the said Stephen P. Armstrong, Freeman C. Read, Edw. J. Halleman, M. W. Haupt, L. W. Zuttermeister, or T. M. Anderson.

And Furthermore, all such bonds, undertakings and recognizances as aforesaid in penalties not exceeding Twenty-five Thousand Dollars ($25,000.00) each, may be signed for the Company and the Seal of the Company attached thereto by anyone of the said T. P. Cunningham, Freeman C. Read, Edw. J. Halleman, M. W. Haupt, L. W. Zuttermeister, or T. M. Anderson, alone.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company as fully and amply, to all intents and purposes, as if they were duly executed by the regular elected officers of said Company.

In Witness Whereof, the Globe Indemnity Company has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed this 17th day of July, 1933.

(Corporate Seal) (Signed) M. A. Craig
(Seal) *Vice-President.*

183 State of New York }
County of New York } ss.

On this 17th day of July, A. D. 1933 before the subscriber a Notary Public of the State of New York, duly commissioned and qualified, came M. A. Craig, Vice-President of the Globe Indemnity Company, to me personally known to be the individual and officer described in, and who executed the preceding instrument, and he acknowledged the execution of the same, and being by me duly sworn, deposed and said, that he is the officer of said Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and the said corporate Seal and his signature as officer were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation, and that Article V, Section I, of the By-Laws of said Company, referred to in the preceding instrument, is now in force.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal at the City of New York the day and year first above written.

(Signed) AUGUST YERKES
Notary Public, Queens Co. No. 2011, *Reg. No.* 5547 *Cert. Filed in New York Co. No.* 7, *Reg. No.* 3-Y3.

(Notarial Seal)

Commission Expires March 30, 1935.

184 I, the undersigned, assistant secretary of the Globe Indemnity Company, do hereby certify that the original Power of Attorney, of which the foregoing on the reverse side hereof is a full, true and correct copy, remains in full force and effect.

IN WITNESS WHEREOF, I have hereunto subscribed my name as Assistant Secretary, and affixed the corporate seal of the Company the day written below.

OSCAR C. KUNZE
Assistant Secretary.

this December 28, 1933.

Filed January 19, 1934 S. T. Burnett, Clerk.

The within appeal and supersedeas bond presented and approved this 19th day of January, 1934.

CHAS. G. BRIGGLE
Judge.

Jan. 24, 189 And afterwards, to wit: on the 24th day of January, A. D. 1934, the following further proceedings were had in said court in said cause and were entered of record, to wit:

190 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption) * *

Comes now the defendant-appellant, The White Phillips Company, Inc., by William L. Patton, Esq., its attorney and upon motion of said defendant-appellant and for good cause shown, it is ordered by the court that the return day on the Citation on Appeal heretofore issued herein be, and is hereby enlarged for a period of thirty days from and after January 25, A. D. 1934, to and including February 24, 1934.

Dated this 24th day of January, A. D. 1934.

Enter

(Signed) CHAS. G. BRIGGLE
U. S. District Judge.

Endorsed, Filed July 24, 1932. S. T. Burnett, Clerk.

Dec. 28, 185 And afterwards, to wit: on the 28th day of December, A. D. 1933, there was filed in the office of the clerk of said court, a certain notice of praecipe and praecipe for transcript, which said notice and praecipe was and is in the words and figures, following, to wit:

186 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption) * *

To James J. Barbour, Esq., and W. Edgar Sampson, Esq., Attorneys for Richey V. Graham:—

Please Take Notice that on the 28th day of December, 1933, the undersigned filed with the Clerk of this Court a praecipe for the record to be transmitted to the United States Circuit Court of Appeals for the Seventh Circuit on the appeal allowed in the above cause, a copy of which praecipe is herewith served upon you.

Dated this 28th day of December, 1933.

WILLIAM L. PATTON
WINSTON, STRAWN & SHAW
Attorneys for The White-Phillips Company, Inc.

Service accepted this 28th day of December, 1933.
JAMES J. BARBOUR and
DOYLE, SAMPSON & GIFFIN
Attorneys for Richey V. Graham.

187 IN THE DISTRICT COURT OF THE UNITED STATES Filed De 1933.

* * (Caption) * *

PRAECIPE FOR RECORD.

To the Clerk of the above Court;—

You Are Hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript the following, and no other papers and exhibits, to-wit;—

1. The transcript of proceedings in the Circuit Court of Sangamon County, Illinois, sent up on removal.
2. All pleadings filed in this court.
3. All orders of the United States District Court for Southern District of Illinois in the cause.
4. The report of the Master in Chancery.
5. Exceptions by The White-Phillips Company, Inc., to the Report of the Master.
6. Statement of evidence filed and approved.
7. Proposed findings of fact and conclusions of law requested by Richey V. Graham.

188 8. Objections and requests by appellant as to findings of fact and conclusions of law.

9. Findings of fact and conclusions of law filed by Hon. Charles G. Briggle, Judge.
10. Exceptions thereto by appellant.
11. Final decree.
12. Petition for appeal and order allowing same.
13. Assignment of errors.
14. Bond on appeal.
15. A copy of this praecipe and notice of filing of same, and all other documents contained in the record in said cause necessary to complete the same pursuant to the rules of the

United States Circuit Court of Appeals for the Seventh Circuit.

16. Certificate of Clerk to said transcript.

WILLIAM L. PATTON
WINSTON, STRAWN & SHAW
Attorneys for The White-Phillips Company, Inc.

Filed December 28, 1933 S. T. Burnett, Clerk.

193 United States of America
Southern District of Illinois } ss:

I, S. T. Burnett, Clerk of the United States District Court in and or the Southern District of Illinois, do hereby certify that the annexed and foregoing is a true and full transcript of the proceedings had of record and on file in the case entitled Edward J. Barrett, Treasurer of the State of Illinois, —vs— The White-Phillips Company, Inc., and Richey V. Graham, No. 1539, In Equity, (prepared in accordance with praecipe for transcript filed therein) as fully as the same appear from the original files and records thereof now in my office remaining.

And I further certify that the original certificate of evidence has been incorporated in the foregoing transcript of record.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Springfield this 8th day of February, A. D. 1934.

S. T. BURNETT
Clerk.

(Seal)

191 CITATION.

The United States of America to Richey V. Graham, Greeting:

You Are Hereby Notified that in a certain case in equity in the District Court of the United States, in and for the Southern District of Illinois, Southern Division, wherein The White-Phillips Company, Inc., a corporation is one of the interpleading parties, and Richey V. Graham is the other interpleading party, an appeal has been allowed the said The White-Phillips Company, Inc., to the United States Circuit Court of Appeals for the Seventh Circuit. And you are hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals in and for the Seventh Circuit, at the City of Chicago, in the State of Illinois on the 25th day of January, A. D. 1934, pursuant to the said appeal to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Charles G. Briggle, Judge of the District Court of the United States, for the Southern District of Illinois, this 28th day of December A. D. 1933.

CHAS. G. BRIGGLE
Judge of the District Court of the United States for the Southern District of Illinois.

192 Due and timely service of the foregoing citation is hereby acknowledged this 28th day of December A. D. 1933.

JAMES J. BARBOUR and
DOYLE SAMPSON & GEFFIN
By W. EDGAR SAMPSON
Attorneys for Richey V. Graham.

Filed Dec. 28, 1933, S. T. Burnett, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 127, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the sixth day of April, 1934, upon which the following entitled cause was heard and determined:

The White-Phillips Company, Inc.,
Appellant,

vs.

Richey V. Graham,
Appellee,

No. 5156, October Term, 1934, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 23rd day of February, A. D. 1935.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the third day of October, 1933, of the October Term, in the year of our Lord, one thousand nine hundred and thirty-three, and of our Independence the one hundred and fifty-eighth.

The White-Phillips Company, Inc.,
Appellant,
5156 *vs.*
Richey V. Graham,
Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

And afterwards, to-wit: On the tenth day of February, 1934, there was filed in the office of the clerk of this court, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1933.

Edward J. Barrett, Treasurer of the State of Illinois,
Complainant in Bill of Interpleader,
vs.
The White-Phillips Company, Inc., and Richey V. Graham,
Defendants, Interpleaded.

The White-Phillips Company, Inc.,
Appellant,
5156 *vs.*
Richey V. Graham,
Appellee.

Appeal from District Court, Southern District, Southern Division.

ENTRY OF APPEARANCE OF COUNSEL FOR APPELLANT.

Now Come William L. Patton and Harold A. Smith, Attorneys for Appellant and Winston, Strawn & Shaw of Counsel,

and enter their appearance in the above entitled cause as such counsel.

WILLIAM L. PATTON,
600 Security Bldg.,
Springfield, Illinois,
HAROLD A. SMITH,
1400 First National Bank
Bldg., Chicago, Ill.,
Counsel for Appellant.

WINSTON, STRAWN & SHAW,
1400 First National Bank Bldg.,
Chicago, Illinois,
Of Counsel for Appellant.

Endorsed: Filed February 10, 1934. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the thirteenth day of February 1934, there was filed in the office of the clerk of this court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5156. October Term, 1933.

The White-Phillips Company

vs.

Richey V. Graham

The clerk will enter my appearance as counsel for appellee.
W. EDGAR SAMPSON,
Springfield, Illinois.

Endorsed: Filed February 13, 1934. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the sixteenth day of February, 1934, there was filed in the office of the clerk of this court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5156. October Term, 1933.

The White-Phillips Company

vs.

Richey V. Graham

The clerk will enter my appearance as counsel for appellee.

JAMES J. BARBOUR,
10 So. La Salle St.,
Chicago, Illinois.

Endorsed: Filed February 16, 1934. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the second day of October, 1934, of the October Term, in the year of our Lord one thousand nine hundred and thirty-three, and of our Independence the one hundred and fifty-ninth.

And afterwards, to-wit: On the second day of October, 1934, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 2, 1934.

Court opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5156 The White-Phillips Company *vs.* Richey V. Graham } Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing on October 30, 1934.

And afterwards, to-wit: On the thirtieth day of October, 1934, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 30, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

The White-Phillips Company	}	Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.
5156 *vs.*		
Richey V. Graham		

On motion of counsel for appellant, leave is hereby granted appellant to file a certified copy of a petition for a writ of certiorari, which was filed in the Supreme Court of Illinois in the case of Northwestern Bank *vs.* Madison & Kedzie Bank.

And on the same day, to-wit: On the thirtieth day of October, 1934, there was filed in the office of the clerk of this court, a Certified Copy of a Petition for a Writ of Certiorari in the case of Northwestern Bank *vs.* Madison & Kedzie Bank, which said Certified Copy is in the words and figures following, to-wit:

No. 18015

IN THE SUPREME COURT OF ILLINOIS.

December Term, A. D. 1926.

Northwestern National Bank of Milwaukee, Wisconsin, a Corporation,
Respondent,
vs.
Madison & Kedzie State Bank, a Corporation,
Petitioner.

Petition for Writ of Certiorari to Appellate Court of Illinois, First District. There heard on appeal from Municipal Court of Chicago. Honorable Philip J. Finnegan, Judge Presiding.

CERTIFIED COPY OF PETITION FOR WRIT OF CERTIORARI.

DETREES, BUCKINGHAM & EATON,
Attorneys for Petitioner.

DON KENNETH JONES,
WILFRED M. DOHERTY,
Of Counsel.

Filed Nov. 17-1926. Charles W. Vail, Clerk.
Filed Oct 30-1934 Frederick G. Campbell, Clerk.

IN THE SUPREME COURT OF ILLINOIS.

December Term, A. D. 1926.

Northwestern National Bank of Milwaukee, Wisconsin, a Corporation,
Respondent,
vs.
Madison & Kedzie State Bank, a Corporation,
Petitioner.

Petition for Writ of Certiorari to Appellate Court of Illinois, First District. There heard on appeal from Municipal Court of Chicago. Honorable Philip J. Finnegan, Judge Presiding.

PETITION FOR WRIT OF CERTIORARI.

And now comes Madison & Kedzie State Bank, a banking corporation organized and existing under the laws of the

State of Illinois, by its attorneys, and petitions this Court to issue the writ of certiorari to review and determine the judgment entered herein by the Appellate Court of Illinois, First District, and shows unto the Court that:

I.

At the October, 1926, Term of the Appellate Court of Illinois, First District, judgment was entered there against petitioner and in favor of the respondent in the sum of $9,000 with interest and costs. The opinion filed by that Court is as follows:

OPINION OF THE APPELLATE COURT.

MR. JUSTICE BARNES delivered the Opinion of the Court:

"Plaintiff filed its statement of claim in replevin on May 14, 1925. Later leave was given to file a statement of claim in trover. Issue was duly taken on the main averments in each, and trial was had without a jury. This appeal is from a judgment on the finding of not guilty.

The following essential facts are not in dispute.

On December 8, 1924, robbers entered plaintiff's bank and stole therefrom, among other securities, four bonds for $1,000 each, issued by the Commercial Utilities Company, a corporation, and five bonds or gold notes for $1,000 each, issued by the Toledo Traction, Power & Light Company, a corporation, all bearing 6% interest, and all of which came into the possession of defendant on May 9, 1925, as collateral to a loan, and were still in its possession at the time of the trial.

After the robbery plaintiff mailed to banks and bond and brokerage houses over 9,000 printed notices of the robbery, giving therein an itemized list of securities lost through it, including a description identifying said bonds by their serial numbers and otherwise. Each envelope containing the notice also contained an addressed, stamped envelope for return to plaintiff, a printed form of letter addressed to plaintiff, acknowledging the receipt of the list, and closing with the words, "Very truly yours." One such envelope with such contents was duly mailed to defendant, and the enclosed addressed envelope bearing the post mark January 5, 1925, was returned to plaintiff the next day through the mail, enclosing the printed letter or receipt of notice, which bore the words

"Madison & Kedzie State Bank, Chicago, Illinois," placed thereon with a red rubber stamp immediately following the words, "Very truly yours." Such a rubber stamp was in use by defendant, and it was the custom of the clerk or employee to whom was assigned the duty of opening and distributing its mail, to use such a rubber stamp on receipts and other papers so received. It was also his custom on receipt of lists of stolen securities or bonds to deliver the lists to the assistant cashier, Schroeder, who in turn placed them in the note-teller's cage for reference by various officers of the bank.

The trial was had in December, 1925. The clerk could not then remember receiving such a list but testified that he might have received it and so stamped the receipt, and would not testify that he did not. Schroeder testified that the first time he saw the list was at another banking house May 11, 1925, two days after the bonds and notes came into the possession of the bank as collateral to a loan it made to an imposter who had previously opened an account with the bank. The negotiation for the loan was had with defendant's assistant cashier Gorman, who submitted the application on such collateral to said Schroeder and Mammoser, vice president and cashier of the bank, all of whom denied having received or seen any notice of the theft before receiving said bonds and notes.

It is unnecessary to go into the details of the transactions between the bank and the imposter. Their only materiality is the bearing they have on defendant's good faith in taking the bonds. While the proof may indicate negligence or lack of business precaution in such transactions, we cannot say the facts with regard thereto are such as impute bad faith to defendant.

The main grounds urged for reversal are (1) that the bonds are not negotiable instruments, and (2) if they were, that defendant took them with notice of defect in the title of the person negotiating them, and, therefore, was not a holder in due course under section 52 of the Negotiable Instrument Law. If the latter contention is correct there is no necessity of considering the former, with which, however, we are not disposed to agree.

Whether the bonds, regarded as negotiable instruments, were taken with notice of defect in the title of the person negotiating them depends on whether defendant had actual knowledge that the bonds were stolen property when it re-

ceived them. Section 56 of the Negotiable Instrument Act provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The real question, as we conceive it, is whether on the undisputed fact that defendant received said notice in the manner aforesaid it is chargeable with actual knowledge of the theft when it received the bonds.

On this point our attention is directed by appellee to the case of *Lord* v. *A. & J. F. Wilkinson*, 56 Barbour 592. In that case the court held that where a banker received stolen notes after having been notified of the theft notice was not conclusive of the question of good faith; that forgetting or omitting to look at the notice at the time of the purchase is not a question of *mala fides*, but is evidence of negligence, and that the question of good faith is for the jury, and that knowledge of the robbery at the time of the purchase was essential to bad faith. Other authorities are there referred to supporting that conclusion, all of which were decided prior to the adoption of the Negotiable Instrument Law as now codified for uniformity. While, as above stated, we do not think, aside from the fact defendant received such notice, that the facts were such as to impute to defendant bad faith, which would be a question of fact, yet we think upon the undisputed fact of its receiving such notice it was chargeable as a matter of law with actual knowledge that the bonds were stolen and, therefore, of defect in the title of the person negotiating them.

Being a corporation, defendant necessarily acted through its agents. Its knowledge must, therefore, be such as necessarily comes to one of its agents acting in the regular course of his duties. Upon the admitted state of facts, as above recited, with no evidence tending to rebut them, it must be inferred that notice of the stolen bonds came in regular course of mail and business into the hands of the proper and only agent of defendant authorized to receive and open its mail, and that in the line of his duty he put the rubber stamp on the receipt and mailed it back. As he had to inspect the contents of the mail in order to know to whom to distribute it he personally must have received actual knowledge of the theft of the bonds.

It becomes a question of law, therefore, whether or not his actual knowledge was that of the defendant corporation which must necessarily acquire knowledge, if at all, through its authorized agents. It is true that the several officers of the bank having to do with the negotiating of said loan denied any knowledge of the notice or of receiving it. But in our opinion the fact of actual notice depends on the authority of the agent to acquire it through opening and inspecting the bank's mail and not on his duty to report it to other agents of the bank. If there was neglect in that respect on his part it did not change the fact that the notice was received by the agent of the bank authorized to receive, acknowledge and deal with it. If to constitute actual knowledge of the bank it would be necessary to bring such notice to the personal attention of each of its several agents likely to deal with such securities then it would open the door to an easy evasion of liability and put a premium on the negotiation of stolen securities. The notice having been received by the proper agent of the bank to receive, open and acknowledge its mail in the line of his duties we think the bank is estopped from claiming that it did not have actual knowledge of the defect in the title to the bonds it subsequently received.

Under modern methods of doing business whereby ready reference may be had to such information thus furnished it, we cannot regard the knowledge thus once obtained by the proper agent to receive it, as being any less actual and binding because at the time of the negotiation of the stolen securities it may have been overlooked or forgotten. Such a fact may be material as held in the case in 56 Barbour and references, where the element of bad faith alone is considered. But the statute makes the alternative of actual knowledge equally important, and it is not made subject to the condition of having been overlooked or forgotten. The difficulties of bringing actual knowledge to the several inmates of banks and brokerage offices, through whom the negotiation of such securities is most likely to be attempted, renders it highly desirable for the protection of innocent losers that the receipt of a special notice of this character by such banks or brokers in the regular course of business should be sufficient to put them on guard against aiding in the circulation of stolen negotiable securities.

In this view of the case we think upon the undisputed evidence defendant had actual knowledge that the bonds were stolen, and as a matter of law was, therefore, not a holder in due course under the uniform Negotiable Instrument Law.

Accordingly as a matter of law the judgment will be reversed and judgment will be entered here for the face of the bonds, namely, $19,[illegible], with interest thereon at the rate of 6% from February 1, 1925, up to which time the bond coupons had been paid or clipped from the bonds before they were received by defendant.

REVERSED AND JUDGMENT HERE.

GRIDLEY, P.J., AND FITCH, J., CONCUR."

II.

PRELIMINARY STATEMENT.

It will be noted that the judgment of the Appellate Court was based solely upon its ruling as a matter of law that receipt by a bank on the 5th day of January, 1925, of a circular list of securities alleged to have been stolen from a bank in a sister state constitutes "*actual knowledge*" within the meaning of Section 56 of the Uniform Negotiable Instruments Act, at a subsequent date, viz., May 9, 1925, of an infirmity or defect in the title of the person then negotiating some of such securities.

The precise point is exceedingly important to the banking and commercial industries of Illinois, in fact to the public at large. It has never been ruled by this Court, or as far as we can determine by any other court in construing the Uniform Negotiable Instruments Act. We submit the following statement of points, authorities and suggestions relied upon for reversal of that judgment based upon that ruling of that point of law.

III.

STATEMENT OF POINTS, AUTHORITIES AND SUGGESTIONS.

A.

The judgment against petitioner is erroneous unless at the time of taking the securities petitioner "had actual knowledge of the infirmity or defect" (in the title of the person negotiating the same).

Section 56 Negotiable Instrument Law, Cahill's Ill. Rev.

Stats. 1925, Chap. 98, Par. 76. Section 52 Negotiable Instrument Law, Cahill's Ill. Rev. Stats. 1925, Chap. 98, Par. 72.

The Appellate Court, at pages 3, 4-5 of its opinion, exonerated petitioner of "bad faith," the disjunctive of Section 56 and at pages 3-4 of its opinion made clear that its judgment was on the assumption of negotiability of the bonds at bar.

B.

"Actual knowledge" is not synonymous with "notice." "Actual notice" in January, 1925, of a claim that securities had been stolen is not "actual knowledge" in May, 1925, that the person then negotiating the securities had any present defect in his title.

Pomeroy, Eq. Jur. 4th Ed., Sec. 592, p. 1103, *et seq.*

Cleveland Woolen Mills v. *Sibert*, 81 Ala. 140, 1 So. Rep. 773.

Fidler v. *Paxton*, 101 Ill. App. 107.

Galveston, H. & S. A. Ry. v. *Parish*, 93 S. W. 682, 685.

Kirkham v. *Moore*, 30 Ind. App. 549, 65 N. E. 1042, 1043.

Rosenberger v. *Hawkes*, (Iowa) 103 N. W. 781, 782.

C.

Under the construction given the Act by the Appellate Court, confusion and uncertainty will be present in every negotiation of negotiable securities.

To illustrate: The Appellate Court holds that a written notice of theft of negotiable paper in January is proof conclusive—not rebuttable—that the purchase of the same securities in May by the banking house receiving the January notice is had with "actual knowledge" in May that the securities are then "stolen property." There is no inherent virtue in the fact that the notice is in writing. There is no statutory prescription of a written notice. The claim may be advanced that in January of a given year a person called at a bank, told the cashier that he was the owner of some United States Liberty Loan bonds—unregistered—that had been stolen from him and advised the cashier of their serial numbers. Five months later the cashier might have forgotten the interview entirely and taken in the identical bonds from a customer. Surely it cannot be as a matter of law that the

cashier then had "actual knowledge" that there was then present a defect in the title of the presenting customer. And yet such is the ruling of law made here by the Appellate Court.

The usefulness of the law merchant and stautory enactment regarding negotiable instruments is forever lost and destroyed once the courts of this country hold that "notice" in one month is "proof conclusive as a matter of law" that bonds taken at a subsequent date are taken with then "actual knowledge." If notice in January constitutes present knowledge in May, then it is proof conclusive of "actual knowledge" five or ten years hence. Such a rule leads to pernicious and absurd results.

The Appellate Court apparently made its decision in fear of the inability of the owners of negotiable papers to prove "actual knowledge" on the part of a subsequent holder. But that consideration violates the cardinal principle that negotiability is an essential factor in commerce; and that the entire theory of the law of negotiable paper is to avoid the rules ordinarily applicable to the ownership and transfer of personal chattels.

We submit that this Court should issue the writ of certiorari here:

1. Because the correct construction to be given Section 56 of the Uniform Negotiable Instruments Act has never been passed upon by a court of last resort.

2. Because a correct and final announcement of the law upon that point in controversy is of the utmost importance to the industry of Illinois.

3. Because the question of "actual knowledge" is of fact—not of law.

4. Because the uncertainty under a ruling that mere notice in January is proof positive (and not rebuttable) of "actual knowledge" in May will create controversy and unsettle the well established principles applicable to negotiable securities.

Wherefore, Madison & Kedzie State Bank, a corporation, petitioner, by its attorneys, respectfully prays that this Honorable Court require, by writ of certiorari, the said above entitled cause be certified to this Court for its review and determination.

DEFREES, BUCKINGHAM & EATON,
Attorneys for Petitioner.

DON KENNETH JONES,
WILFRED M. DOHERTY,
Of Counsel.

State of Illinois, } ss.
Supreme Court. }

I, Adam F. Bloch, Clerk of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the above and foregoing to be a true copy of Petition for Certiorari filed in my office November 17, 1926 in a certain cause entitled in this Court Madison and Kedzie State Bank, a corporation, Petitioner, No. 18015 *vs.* Certiorari First District Northwestern National Bank of Milwaukee, Wisconsin, a corporation, Respondent, filed in this office on the 17th day of November, A. D. 1926.

I further certify that the petition for certiorari in this case was denied on December 20, 1926.

Witness my hand and Seal of said Supreme Court, at Springfield, in said state, this 8th day of October, A. D. 1934.

ADAM F. BLOCH,
Clerk.

(Seal)

Endorsed: Filed October 30, 1934. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the thirtieth day of October, 1934, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 30, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5156 The White-Phillips Company *vs.* Richey V. Graham. } Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral arguments by Mr. William L. Patton, counsel for appellant, and by Mr. James J. Barbour, counsel for appellee, and the court having heard the same, takes this matter under advisement.

And afterwards, to-wit: On the eighth day of December, 1934, there was filed in the office of the clerk of this court, the Opinion of the court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5156. October Term, 1934, October Session, 1934.

THE WHITE-PHILLIPS COMPANY, Inc., *Appellant,*

vs.

RICHEY V. GRAHAM, *Appellee.*

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

December 8, 1934.

Before ALSCHULER, EVANS, and SPARKS, *Circuit Judges.*

EVANS, *Circuit Judge.* By appropriate action the Treasurer of Illinois sought to determine the legal ownership of eight $1000 Illinois Highway bonds which had been stolen from appellee and which subsequently, through purchase, came into the possession of appellant.

The Facts. Appellee placed the eight Illinois Highway bonds in a safe in his home. Burglars stole them on or about September 2, 1930. He immediately gave notice of the theft to the Foreman State Corporation and to others. Pursuant to its custom the Foreman company mailed a report of this theft to a list of municipal bond dealers on or about September 5. The Chicago branch of the appellant company was on Foreman's mailing list.

Appellant is a dealer in municipal bonds with its principal office in Davenport, Iowa, and a branch office in Chicago. About half of its business is transacted in each office, but the staff in Davenport is four times as large as that employed in Chicago, hence the description of the Davenport branch as the principal office.

The bonds in question were acquired by appellant from J. A. Connolly of St. Paul who, on September 13, 1930, wrote to the Chicago branch asking for bids on eight Illinois Highway bonds and giving the maturity dates. On the 16th appellant's Chicago office wired a bid which was promptly accepted. Directions were given to ship the bonds to Davenport, but, accompanied by a sight draft payable to a Chicago bank, they were sent by Connolly to Chicago on September 22, and payment was promptly made. The bonds were then sent to the Davenport office and received by it on September 23, and were there used as collateral to secure a loan.

The case turns upon the matter of appellant's knowledge. It appears that when the bonds arrived in the Davenport office and were lying upon the desk of a clerk, that employee went to a pencil sharpener near by, and while he was sharpening a pencil his eye chanced to fall upon the notice of a list of stolen bonds which hung upon a nearby wall hook. Observing that Illinois Highway bonds appeared thereon he recalled that such described bonds were on his desk. Upon examining the numbers of these bonds he discovered that they had been stolen. He notified the Chicago office which in turn tried to recover the purchase price from Connolly. Connolly was sent to jail where he died. No money was recovered, and the legal ownership of the bonds remained unsolved.

The evidence is unsatisfactory in so far as it relates to appellant's method of handling the notices of theft. There was evidence that both the Chicago and Davenport branches had in the past received notices of stolen bonds. It was the practice in the Chicago branch to place them in a drawer. The Davenport branch placed them upon a hook. There were no directions to the employees as to the handling of them, and no settled policy was pursued in bringing such notices to the attention of the office; nor were tabulations or records kept of such lists; nor were they examined before bonds were purchased. No employee was instructed to note, record or circulate the contents of the lists.

In Davenport, the office boys in charge of the mail put the lists on the hook "because they didn't know of anywhere else to put them," and they also put other papers on the same hook. There is no affirmative evidence that the particular notice was received by the Chicago branch, although other notices of similar import had been received and the Chicago office was on Foreman's mailing list. Employees of the Chi-

cago branch testified that they searched the Chicago office and found no such notice.

In consummating the sale of the bonds appellant never inquired as to the serial numbers of the bonds. Testimony showed that appellant, not knowing Connolly, looked him up in a Security Dealers Registry, found him listed, and proceeded to deal with him.

The District Court made findings in appellee's favor. As a conclusion of law, it found:

> "That the respondent, by reason of having actually received, prior to its purchase of the securities here involved, a notice that the same had been stolen as hereinabove set forth, did not, by the purchase of said bonds, become a holder thereof in due course, but that at such time the said respondent had knowledge of such facts that its action in taking such securities amounted to bad faith."

The following provisions of the Illinois Negotiable Instruments Act are applicable:

> "Holder in Due Course Defined. Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:
>
> "1. That the instrument is complete and regular upon its face.
>
> "2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact.
>
> "3. That he took it in good faith and for value.
>
> "4. That at the time it was negotiated to him he had no *notice* of any infirmity in the instrument or defect in the title of the person negotiating it. (Chap. 98, ¶ 72, Cahill's Ill. Rev. Stats.)
>
> "Notice of Infirmity—What Constitutes. Sec. 56. To constitute *notice* of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had *actual knowledge* of the infirmity or defect, or *knowledge* of such facts that his action in taking the instrument amounted to *bad faith.*" (Chap. 98, ¶ 76, Cahill's Ill. Rev. Stats.)

The narrow question is: Did appellant have "*actual knowledge* of the infirmity or defect, or *knowledge of such facts* that his (its) action in taking the instrument amounted to *bad faith*"?

Appellant supports its argument that it, as a purchaser of negotiable instruments in good faith, before maturity and for valuable consideration, should be protected against a charge of bad faith, which has no fact support other than the general circulation of notices among dealers to the effect that a few of a large issue of bonds had been stolen, by citation of opinions, both English and American. *Vermilye & Co.* v. *Adams Exp. Co.*, 21 Wall. 138; *Raphael* v. *Bank of England*, 17 C. B. 161; 139 Eng. Repr. 1030; *Seybel* v. *Nat. Curr. Bank*, 54 N. Y. 288; *Heney* v. *Sutro & Co.*, 153 Pac. 972; *Merch. Nat. Bank* v. *Detroit Trust Co.*, 242 N. W. 739; 258 Mich. 526. See also *Kean* v. *National City Bank*, 294 F. 214 (C. C. A. 6).

Appellee leans rather heavily on the recent decision of an Illinois court (*Northwestern Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22) (the substance of which decision appears later in this opinion) which, although not binding upon us, is entitled to dominant if not controlling influence, so it is urged, because of the standing of the court and the persuasive argument which supports the court's conclusion. He also contends that the facts above related would have led to a similar conclusion in any of the courts to whose decisions appellant so confidently points. *Morris* v. *Muir*, 111 Misc. (N. Y.) 739; *Arnd* v. *Aylesworth*, 145 Iowa 185; *Ward* v. *City Trust Co.*, 117 App. Div. 130.

It is clear, we think, since the decision of *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487, that the holdings of the Illinois Supreme Court, if any exist, construing this Negotiable Instruments Act must govern our decision. Whatever we may think of the advisability and the desirability of a construction of the Uniform Negotiable Instruments Act, which would be similar throughout the United States (possible only through a decision of the United States Supreme Court uncontrolled by the decisions of the various state courts), we accept this decision unhesitatingly as announcing a rule which we must apply when we construe sections of the state statute defining the rights of a purchaser of negotiable instruments. This is true even though the statute is a Uniform Act that has been adopted in more than a score of states.

It is, however, only the decisions of the highest courts of the states that are binding upon us. *Hudson* v. *Maryland Casualty Co.*, 22 F. (2d) 791 (CCA 8).

The fact that the defeated party sought to review the decision in the *Northwestern Nat. Bank* case, *supra*, and the

Supreme Court of Illinois denied its application for a certiorari makes that decision no more authoritative. *People* v. *Grant*, 283 Ill. 391, 397; *Minn. St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410; *U. S.* v. *Carver*, 260 U. S. 482. The rule announced in said *Northwestern Nat. Bank* case, *supra*, has not been approved, or passed upon, by the Illinois Supreme Court.

It becomes our duty, therefore, to examine the question in the light of all of the decisions of state and Federal courts and follow the United States Supreme Court decisions, if there are any in point; otherwise to announce that decision which in our opinion is in accord with the weight of reason and authority.

It is hardly necessary to quote at length from the leading English cases or from *Vermilye & Co.* v. *Adams Exp. Co.*, *supra*. Only the pertinent excerpts are here set forth. In *London Joint Stock Bank* v. *Simmons*, App. Cas. 219 (1892), Lord Field said:

> "In one of those cases, *Raphael* v. *Bank of England*, the plaintiff had, at some earlier period, received actual notice that the bank note in question had been stolen, but it was established to the satisfaction of the jury that the notice had been forgotten and was not present to his mind at the time of taking, and he was held entitled to recover."

In *Venables* v. *Baring Bros. & Co.*, (1892) 3 Ch. Div. 527, Lord Kekewich said:

> "* * it was held that the holder might sue upon it (negotiable instrument), notwithstanding that when he took it he had the means at his disposal which would have enabled him to detect the bad title of his transferor; but of which means he neglected to avail himself. Negligence was there held to be no defense whatever, and I apprehend that principle is really the guide to all the decisions."

In *Vermilye & Co.* v. *Adams Expr. Co.*, *supra*, the court said:

> "By the well settled law of the case they (bankers) may purchase such paper before due without cumbering their minds or their offices with memoranda of such notices."

In *Goodman* v. *Simonds*, 20 How. at 365, the court said:

> "* * * if a bill of exchange endorsed in blank, so as to be transferable by delivery, be misappropriated by one to

whom it was intrusted, or even if it be lost or stolen, and afterwards negotiated to one having no knowledge of these facts, for a valuable consideration, in the usual course of business, his title would be good . . . . The word *notice,* as used by this Court on the occasion referred to, we think must be understood in the same sense as knowledge, and indeed that is one of its usual and appropriate significations. . . . He (the purchaser) is then to be affected, if at all, by what has occurred between other parties, and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had knowledge of such facts and circumstances at the time the transfer was made.

"Nothing less than proof of knowledge of such facts and circumstances can meet the exigencies of such a defence. . . .

"According to the rule laid down in *Goodman* v. *Harvey,* which indubitably is the settled law in all the English Courts, proof that the plaintiff had been guilty of gross negligence in acquiring the bill, ought not to defeat his right to recover; and if not, it serves to exemplify the magnitude of the error assumed in the instruction, that any facts and circumstances which would excite the suspicion of a careful and prudent man were sufficient to destroy the title. It is clear that one or the other of these rules must be incorrect; both cannot be upheld. Gross negligence is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property; and if such neglect would not defeat the right to recover—and clearly it would not, unless attended by bad faith—it cannot require any farther reasoning to demonstrate that the instruction was erroneous."

In *Hotchkiss* v. *Nat. Banks,* 21 Wall. 354, the court said:

"The law is well settled that a party who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or wilful ignorance, and the burden

of proof lies on the assailant of the title. It was so expressly held by this court in *Murray* v. *Lardner* (2 Wall. 110)."

More nearly parallel to the case at bar is the language of the court in *Merchants Nat. Bank* v. *Detroit Trust Company*, 258 Mich. 526, 242 N. W. 739.

"* * We have no reason to doubt their testimony that they did not see or receive the notice. But, assuming that it was received, that they saw it and forgot about it or carelessly mislaid it so that it was not in their minds at the time they acquired the bonds, or assuming that it was received but through the carelessness of the mailing clerk it was not brought to the attention of the officers, how would these facts affect the company's title as holder in due course?"

The court repudiated the decision upon which appellee so strongly relies, *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22.

Speaking of this decision, it says:

"As far as we have been able to determine, this case stands alone. It estops the purchaser from showing good faith at the time the bonds are acquired. It makes notice of theft conclusive evidence of *mala fides*. It overlooks the well-established rule that, though one has received actual notice, if by forgetfulness or negligence he does not have it in mind when he acquires the bonds, he may still be a good-faith purchaser."

In fairness to appellee and to the Illinois Appellate Court, we think its opinion should be set forth in its own language. *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22.

"It becomes a question of law, therefore, whether or not his actual knowledge was that of the defendant corporation which must necessarily acquire knowledge, if at all, through its authorized agents. It is true that the several officers of the bank having to do with the negotiating of said loan denied any knowledge of the notice or of receiving it. But in our opinion the fact of actual notice depends on the authority of the agent to acquire it through opening and inspecting the bank's mail and not on his duty to report it to other agents of the bank. If there was neglect in that respect on his part it did not change the fact that the notice was received by the agent of the bank authorized to receive, acknowledge

and deal with it. If to constitute actual knowledge of the bank it would be necessary to bring such notice to the personal attention of each of its several agents likely to deal with such securities then it would open the door to an easy evasion of liability and put a premium on the negotiation of stolen securities. The notice having been received by the proper agent of the bank to receive, open and acknowledge its mail in the line of his duties, we think the bank is estopped from claiming that it did not have actual knowledge of the defect in the title to the bonds it subsequently received.

"Under modern methods of doing business whereby ready reference may be had to such information thus furnished it, we cannot regard the knowledge thus once obtained by the proper agent to receive it, as being any less actual and binding because at the time of the negotiation of the stolen securities it may have been overlooked or forgotten."

After a study of all the authorities we find ourselves unable to follow the rule announced in the *Northwestern Nat. Bank* case as a test of what constitutes bad faith and we must adopt the rule which seems to us to be backed by the greater weight of authority and which is founded upon the commercial necessity of giving the greatest possible saleability to negotiable instruments.

There remains nothing but to apply the rule thus accepted to the facts in the instant case and thus ascertain whether appellant had actual knowledge of the defect of title of the bonds it purchased or to ascertain whether it had knowledge of such facts that its action in purchasing the bonds amounted to *bad faith*.

In determining this question, we assume that the notices which were sent out by the Foreman company were received both at Davenport and Chicago; that there was a want of ordinary care upon the part of the Chicago branch in not making more elaborate provision for the dissemination of the knowledge which said notices gave; that in purchasing the bonds appellant paid full value therefor; and at the time it had no actual knowledge they were stolen; that it made no investigation to ascertain whether the said bonds were stolen other than to inquire as to the status of the party who offered them for sale; that the information which came from the receipt of such notice of the theft of eight Illinois Highway bonds had been forgotten.

The District Court, in disposing of the case, did not make findings of fact respecting the existence of good or bad faith. It did recite the facts wherefrom it made a conclusion of law, as above stated.

Convinced as we are that the question has not been settled by the Supreme Court of Illinois and that the decision of the Illinois Appellate Court, above referred to, is contrary to the overwhelming weight of authority including the decisions of the United States Supreme Court, we find this issue in appellant's favor.

The decree is reversed with directions to proceed further in accordance with the views here expressed.

Endorsed: Filed December 8, 1934. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the eighth day of December, 1934, the following further proceedings were had and entered of record, to-wit:

Saturday, December 8, 1934.

Court met pursuant to adjournment and was opened by proclamation,

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

The White-Phillips Company, Inc.
5156 *vs.*
Richey V. Graham

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Illinois, Southern Division, and was argued by counsel.

On Consideration Whereof: It is now here ordered, adjudged and decreed by this court that the Decree of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court for further pro-

ceedings in accordance with the views expressed in the Opinion of this Court.

And afterwards, to-wit: On the twenty-sixth day of December, 1934, there was filed in the office of the clerk of this court, a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

And afterwards, to-wit: On the twenty-eighth day of January, 1935, the following further proceedings were had and entered of record, to-wit:

Monday, January 28, 1935.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5156 The White-Phillips Company *vs.* Richey V. Graham } Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

It is ordered by the court that the petition for a rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the twenty-ninth day of January, 1935, the Mandate of this court issued to the District Court of the United States for the Southern District of Illinois, Southern Division.

And afterwards, to-wit: On the fourth day of February, 1935, the following further proceedings were had and entered of record, to-wit:

Monday, February 4, 1935.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Evan A. Evans, Circuit Court.

The White Phillips Company, Inc.
5156 *vs.*
Richey V. Graham

} Appeal from the District Court of the United States for the Southern District of Illinois Southern Division.

Now this day comes James J. Barbour, counsel for appellee, and states that he intends to present a petition for a writ of certiorari in this cause to the Supreme Court of the United States.

Thereupon, It is ordered that the mandate of this court in this cause, heretofore issued to the District Court of the United States for the Southern District of Illinois, Southern Division, be, and the same is hereby recalled and stayed until the further order of this court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 131 to 154, inclusive, contain a true copy of the proceedings had and papers filed (excepting the briefs of counsel and the Petition for a Rehearing) in the case of:

The White-Phillips Company, Inc.,

Appellant,

vs.

Richey V. Graham,

Appellee,

No. 5156, October Term, 1934, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 23rd day of February, A. D. 1935.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 27, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

APR 23 1935
CHARLES ELMORE CROP
CLERK

IN THE

Supreme Court of the United States

October Term, 1934.

No. [redacted] 29

RICHEY V. GRAHAM,

Petitioner,

v.

THE WHITE-PHILLIPS COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT.

MR. JAMES J. BARBOUR,
Chicago, Illinois,

MR. W. EDGAR SAMPSON,
Springfield, Illinois,
Attorneys for Richey V. Graham, Petitioner.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

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IN THE

Supreme Court of the United States

October Term, 1934.

No.

RICHEY V. GRAHAM,

Petitioner,

v.

THE WHITE-PHILLIPS COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT.

Richey V. Graham prays that a writ of *certiorari* issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above cause on December 8, 1934 (R. 152) and denying the petition of Richey V. Graham for a rehearing on January 28, 1935 (R. 153), the said judgment reversing the decree of the District Court of the United States for the Southern District of Illinois, Southern Division, entered December 1, 1933 (R. 113-4).

The Findings of Fact and Conclusions of Law (R. 105-110) were signed by Honorable Charles G. Briggle, Judge, and entered of record on December 1, 1933, without written opinion.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 144-152) is reported in *74 Fed. (2d) 417.*

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 8, 1934 (R. 152). Rehearing petition was filed on December 26, 1934 (R. 153), and denied on January 28, 1935 (R. 153). The jurisdiction of the Court is invoked under *Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Sec. 347-a, Title 28 U. S. Code).*

QUESTIONS PRESENTED.

1. Whether, as a matter of law, The White Phillips Company, Inc., respondent, by reason of having actually received, prior to its purchase on September 22, 1930, of 8 $1000 Illinois Highway Bonds from one J. A. Connolly, a notice that the same had been stolen from Richey V. Graham, failed to become a holder thereof in due course.

2. Whether the denial by the Supreme Court of the State of Illinois of a writ of *certiorari* upon the application of *Madison and Kedzie State Bank, Petitioner, v. Northwestern National Bank, Respondent,* to review and determine the judgment entered by the Appellate Court of Illinois, of the First District, did not under the holdings of said Supreme Court of Illinois, constitute an approval of the conclusion reached by the said Appellate

Court of Illinois, First District, and whether the said action of the Supreme Court of Illinois, was not under its holdings, in effect, an affirmance of the judgment of the said Appellate Court in the cause of *Northwestern National Bank v. Madison & Kedzie State Bank*, reported in *242 Illinois Appellate Court Reports, at page 22.*

3. Does not, by reason of the denial of the said application for writ of *certiorari* by the Supreme Court of Illinois, the conclusion reached by the Appellate Court of Illinois in *Northwestern National Bank v. Madison & Kedzie State Bank, 242 Ill. 22*, govern the decision of the Courts of the United States involving the same point with reference to causes of action arising within the State of Illinois, and hence is it not decisive of this cause wherein Richey V. Graham, Petitioner, seeks the writ of *certiorari?*

4. Whether the action of The White-Phillips Co., Inc., in adopting the policy of disregarding, ignoring and treating as "junk" all notices descriptive of bonds, securities or negotiable instruments that had been stolen, coming to it from the true owners thereof, so that no reference would be made to said notices at any time to ascertain whether or not the securities which the respondent was daily purchasing were listed on these notices as stolen, did not make the respondent guilty of bad faith in purchasing the bonds stolen from Richey V. Graham, inasmuch as the respondent prior to the purchase received printed notice of said bonds having been stolen, and gave no consideration to the information contained in said circular, but on the other hand wilfully disregarded it.

5. Whether the respondent The White-Phillips Co., Inc., did not at the time of the purchase of the bonds in question have knowledge of such facts that its action in taking such securities amounted to bad faith.

THE STATUTES INVOLVED.

The Statutes involved will be found in the appendix, *infra*, pp. 20-21.

STATEMENT.

THE FACTS. The petitioner, Graham, placed the 35 $1000 Illinois Highway bonds in a safe in his home. Burglars stole them on or about September 2, 1930. He immediately gave notice of the theft to the Foreman State Corporation and to others. Pursuant to its custom the Foreman Company mailed a report of this theft to a list of municipal bond dealers on or about September 5. The Chicago branch of the respondent was on Foreman's mailing list.

Respondent is a dealer in municipal bonds with its principal office in Davenport, Iowa, and a branch office in Chicago.

Eight of the thirty-five stolen bonds were subsequently acquired by respondent from J. A. Connolly of St. Paul who, on September 13, 1930, wrote to the Chicago branch asking for bids on eight of these Illinois Highway bonds which had been stolen from Graham, giving the maturity dates. On the 16th, respondent's Chicago office wired a bid which was promptly accepted. Directions were given to ship the bonds to Davenport, but, accompanied by a sight draft, payable to a Chicago bank, they were sent by Connolly to Chicago on September 22, and payment was promptly made by the Chicago office. The bonds were then sent to the Davenport office and received by it on September 23.

The case turns upon the matter of respondent's knowledge. It appears that when the bonds arrived in the Davenport office and were lying upon the desk of a clerk, that employee went to a pencil sharpener near by, and

while he was sharpening a pencil his eye chanced to fall upon the notice of a list of stolen bonds which hung upon a nearby wall hook. Observing that Illinois Highway bonds appeared thereon he recalled that such described bonds were on his desk. Upon examining the numbers of these bonds he discovered that they had been stolen. He notified the Chicago office which in turn tried to recover the purchase price from Connolly. Connolly was sent to jail where he died. No money was recovered, but the respondent immediately used the bonds as collateral to secure a loan from a Davenport bank.

There is evidence that both the Chicago and Davenport branches had in the past received notices of stolen bonds. It was the practice in the Chicago branch to place them in a drawer. The Davenport branch placed them on a hook. There were no directions to the employees as to the handling of them, and no settled policy was pursued in bringing such notices to the attention of the office; nor were tabulations or records kept of such lists; nor were they examined before bonds were purchased. No employee was instructed to note, record or circulate the contents of the lists.

In Davenport, the office boys in charge of the mail put the lists on the hook "because they didn't know of anywhere else to put them," and they also put other papers on the same hook.

(The foregoing is largely an abbreviation of the statement of facts by the Court of Appeals.)

Master in Chancery Edward P. Allen found that copies of the notice entitled "Stolen Bonds" were mailed by the Foreman State Corporation to the White-Phillips Co., Inc., at its Chicago office and also the main office at

Davenport (R. 87), and that the said The White-Phillips Co., Inc., received both of said notices entitled "Stolen Bonds", but that no examination was made of said notices, and no consideration of the information as contained in said circular was given to it whatsoever, but on the other hand, totally and utterly disregarded (R. 88). He further found

> "that the policy of said The White-Phillips Co., Inc., in the handling of said notices received, either at the Chicago or Davenport offices of said Company, was of such a character that said notices were totally disregarded, and none of the clerks or office force of said Company were instructed to examine or refer to said notices of stolen securities; that the Executives of said Company considered all of said notices of like character as 'junk,' and that no system was followed in the handling of these notices, except in the Chicago office they were placed in a drawer with miscellaneous matters, and in the Davenport office were filed upon a clip, but no reference was made to them at any time to ascertain whether or not the securities which they were daily purchasing were listed on these notices as stolen (R. 88). The District Court found that no effort was at any time made by said respondent, either by consultation of the records in its office, or otherwise, to investigate or ascertain the title of said J. A. Connolly in and to said bonds, or his right to dispose of the same, or to discover whether or not said bonds had been stolen. (7th Fact finding p. 107); and (8th Fact finding) that the purpose of the hook or clip in the outer office at Davenport 'among other things was to hold and display notices of stolen securities of the character here involved; but that in said office no one of the employes, officers or agents of said respondent was charged with the duty of making any check upon the contents of such notices so received by said respondent, and no system for conveying or recording or preserving such information as might be contained in such notices and similar notices received at respondent's Chicago offices to the members of the office

force of said respondent had ever been put into effect. That said hook or clip was used by the office boy who opened the mail, for the purpose of holding a variety of circulars, notices as to stolen securities, which were not distributed by the office boy to individuals in the office for attention, and there was no policy or custom in said office requiring any one in the office to pay any attention to the said hook or clip or anything it held.'" (R. 107-8.) The Court's Tenth Fact finding is:

That the respondent, The White-Phillips Company, Inc., as a corporate entity, at and before it purchased the aforesaid bonds had, by virtue of the notice so received at its Davenport office, received actual notice that the same had been stolen from the said Richey V. Graham, the true owner thereof; that at the time of such purchase the said mimeograph notice was on the hook or clip hereinbefore referred to; that said notice was in such position that nothing more than a casual glance by a person standing in the vicinity thereof was required to convey information that the bonds here involved had been stolen; and that the failure and neglect of said respondent to observe and learn the contents of such notice prior to the purchase of the securities here involved must be considered as amounting to a wilful and conscious disregard of the rights of the true owners of said securities, the said Richey V. Graham (R. 108-9). The District Court's fifth and final conclusion of law is:

That the respondent, The White-Phillips Company, Inc., by reason of having actually received, prior to its purchase of the securities here involved, a notice that the same had been stolen as hereinabove set forth, did not, by the purchase of said bonds, become a holder thereof in due course, but that at such time the said respondent had knowledge of such facts that its action in taking such securities amounted to bad faith (R. 109-10).

In the decree the District Court adjudged:

> "That the exceptions filed by the respondent The White-Phillips Company, Inc., to the Report of Edward P. Allen, Master in Chancery, to whom this cause was hitherto referred, be and the same are hereby overruled" (R. 113).

The Court of Appeals in concluding its opinion held:

> "In determining this question, we assume that the notices which were sent out by the Foreman Company were received both at Davenport and Chicago; that there was a want of ordinary care upon the part of the Chicago branch in not making more elaborate provision for the dissemination of the knowledge which said notices gave; that in purchasing the bonds appellant paid full value therefor; and at the time it had no actual knowledge they were stolen; that it made no investigation to ascertain whether the said bonds were stolen other than to inquire as to the status of the party who offered them for sale; that the information which came from the receipt of such notice of the theft of eight Illinois Highway bonds had been forgotten" (R. 151).

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that "the fact that the defeated party sought to review the decision" and the Supreme Court of Illinois denied its application for a *certiorari* makes the decision in the case of *Northwestern National Bank v. Madison & Kedzie State Bank,* in the Appellate Court of Illinois, no more authoritative.

2. In holding that the rule announced in *Northwestern National Bank v. Madison and Kedzie State Bank, 242 Ill. App. 22,* had not been approved and passed on by the Supreme Court of Illinois by virtue of its having passed on and denied application for a writ of *ceritorari* to review said action of said Appellate Court in said cause.

3. In holding that the action of the highest Court of Illinois in approving the conclusion reached by the Appellate Court of Illinois in the case of *Northwestern National Bank v. Madison & Kedzie State Bank, 242 Ill. App. 22,* and the affirmance of said judgment by the Supreme Court of Illinois by reason of its denial of the application for a writ of *certiorari,* as aforesaid, did not govern the Courts of the United States with reference to the same point in the cause of action arising in the State of Illinois in favor of Richard V. Graham and against the White-Phillips Company, Inc., and brought to the District Court of the United States for the Southern District of Illinois, Southern Division, by removal from the Circuit Court of Sangamon County, Illinois.

4. In holding that the printed notice received by The White-Phillips Company, Inc., prior to its purchase of the eight Illinois Highway bonds for $1000 each, that the said bonds had been stolen from and were the property of Richard V. Graham, did not render the said purchase invalid and the said Company liable for the return to said Graham of said bonds as the owner.

5. In holding that the respondent when it purchased said bonds did not have actual knowledge of the infirmity or defect in the title to said bonds and that the same were the property of Richey V. Graham.

6. In holding that the respondent, The White-Phillips Company, Inc., did not, when it acquired the eight Illinois Highway bonds from J. A. Connolly, have knowledge of such facts that its acts in taking the said bonds amounted to bad faith.

7. In reversing the decree and judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

The decision below appears to be erroneous. We submit that when the Supreme Court of Illinois denied the application for a writ of *certiorari* in the case of *Northwestern National Bank v. Madison and Kedzie State Bank, 242 Ill. App. 22,* it thereby approved the conclusion reached by the Appellate Court and the denial of the said writ was in effect an affirmance of the judgment of the Appellate Court. The Supreme Court of Illinois so ruled in the case of *Soden v. Claney, 269 Ill. 98-102,* and a close reading of *People v. Grant, 283 Ill. 391, 397,* shows that the Court still adheres to its ruling in *Soden v. Claney, supra,* as it points out that the case under consideration was a different case than one counsel had referred to that had been before the Appellate Court where the Court had denied a writ of *certiorari.*

The Court says in the *Grant case* that the denial of the writ of *certiorari* in the mandamus case therein referred to meant nothing more than "that we approve the conclusion of the Appellate Court that the State's Attorney should have signed and presented the petition".

This Court adopted the ruling of the Illinois State Supreme Court that the denial of a writ of *certiorari* is an approval of the conclusion reached by the Appellate Court and in effect is an affirmance of the Appellate Court judgment, in the case of *Minneapolis, St. Paul and Sault Ste. Marie Ry. Co., Petitioner, v. John Rock, 279 U. S. 410 (412),* and cited *Soden v. Claney, supra,* and *People ex rel. Hoyne v. Grant, supra,* as establishing that rule of the Illinois Supreme Court. In the same case this Court holds that:

> "Whenever the highest court of a state by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it can by law

exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper decision attach." *279 U. S. 412.*

The conclusion reached by the Illinois Appellate Court in *Northwestern Natoinal Bank v. Madison & Kedzie State Bank, supra,* was that:

> "As a matter of law receipt by a bank on the 5th day of January, 1925, of a circular list of securities alleged to have been stolen from a bank in a sister state constitutes 'actual knowledge' within the meaning of *Section 56 of the Uniform Negotiable Instruments Act,* at a subsequent date, viz., May 9, 1925, of an infirmity or defect in the title of the person then negotiating some of such securities."

The foregoing interpretation of the ruling of the Appellate Court was submitted to the State Supreme Court by the Madison and Kedzie State Bank, the petitioner for the writ, with the statement that "the judgment of the Appellate Court was based solely upon its (that) ruling," and that:

> "The precise point is exceedingly important to the banking and commercial industries of Illinois, in fact to the public at large. It has never been ruled on by this (Ill. State Supreme) Court, or as far as we can determine by any other court in construing the Uniform Negotiable Instruments Act."

See copy of petition for writ of *certiorari* (R. 142, with certificate of Adam F. Bloch, Clerk of said Illinois Court).

And the Appellate Court of Illinois likewise defines the question involved and the conclusion reached in its decision when it sets forth in its opinion:

> "The real question, as we conceive it, is whether on the undisputed fact defendant received said notice in the manner aforesaid, it is chargeable with the actual knowledge of the theft when it received the

> bonds" (R. 138). • • • "The notice having been received by the proper agent of the bank to receive, open and acknowledge its mail in the line of his duties, we think the bank is estopped from claiming that it did not have actual knowledge of the effect of the bonds it subsequently received. • • • In this view of the case we think upon the undisputed evidence defendant had actual knowledge that the bonds were stolen, and as a matter of law, therefore, was not a holder in due course under the Uniform Negotiable Instruments Law. Accordingly as a matter of law the judgment will be reversed" (R. 139-140).

If we are correct in this, it shows that the holding in *Northwestern National Bank v. Madison & Kedzie State Bank, supra*, was binding on the District and Circuit Court of Appeals Courts in the instant cause and that the District Court followed the law as to notice as declared by the State Courts of Illinois, while the Circuit Court of Appeals in not following the rulings of the State Courts committed error in their reversal of the decree of the District Court.

The *facts being* established that the respondent received printed notices by mail in both its offices, notifying it that $35,000 of Illinois Highway bonds had been stolen from the residence of petitioner, and that no examination was made of said notices, and no consideration whatsoever was given of the information contained in said circular, but on the other hand, the same was totally and utterly disregarded (R. 88); and that the policy of the White-Phillips Co., Inc., was to disregard all notices of stolen securities and to consider them as "junk" and to make no reference to them at any time to ascertain whether or not the securities which they were daily purchasing were listed on these notices as stolen (R. 87-88), and that within less than eleven days after the said notices had been re-

ceived by the respondent it offered to, and six days later did, purchase eight of the stolen bonds from J: A. Connolly, a non-resident stranger; and that no effort was at any time made by said respondent (W-P Co.), either by consulting the records of its office, or otherwise, to investigate or ascertain the title of Connolly in and to said bonds, or his right to dispose of the same, or to discover whether or not said bonds had been stolen (R. 107), established as a matter of law that the respondent under the provisions of *Sections 52 and 56 of the Illinois Negotiable Instruments Law* was not a holder in due course of the eight bonds so acquired, for the reason that it did not take said bonds in good faith; and that at the time of the negotiation it had received notice of:

> "Infirmity in the instrument or (and) defect in the title of the person negotiating it, and the respondent had actual knowledge of the infirmity or defect, (in that it had received the circular notification of the bonds having been stolen), and knowledge of such facts (to-wit: its policy of disregarding such and all other like warnings) that its action in taking the instrument amounted to bad faith."

And the Master in Chancery in his report, and the District Court in its Findings of Fact and Conclusions of Law both so found.

The wording of *Section 56 of the Illinois Statute* defining "What is notice of defect" is in the past tense, *i. e.*, "the person to whom it is negotiated must *have had* actual knowledge of the infirmity or defect," and we submit that the language and effect of the statute annot be evaded by showing that the party receiving the instrument *had had* knowledge of the defect in the instrument he subsequently purchased, but that as a matter of business policy he cast aside and ignored the notice.

ILLINOIS DECISIONS DEFINING NOTICE.

Drouineau v. Bank, 244 Ill. App. 251.
Seaverns v. Presbyterian Hospital, 173 Ill. 414, 420.
Simmons v. Roseland Security Vault Co., 331 Ill. 563-574.
First National Bank, Taylorville, v. Kalb, 256 Ill. App. 159.
Peru State Bank v. Waggett, 230 Ill. App. 522.
Tollifsen v. Middle States Inv. Co., 253 Ill. App. 320.
Housh v. Tolson, 254 Ill. App. 126-132-134.
Metcalf v. Draper, 98 Ill. App. 399-404.

So that it seems a certainty

(1) That the Illinois Legislature made the serving of notice of the infirmity or defect of title to a negotiable instrument complete protection to the true owner of the instrument, against a subsequent purchaser of stolen securities who had therefore received a copy of the notice.

(2) The Supreme Court of Illinois has repeatedly defined what method of service of notice is sufficient to bind a corporation; and

(3) When the Appellate Court in the case of *Northwestern National Bank v. Madison & Kedzie State Bank, supra,* followed the wording of the Statute and the holdings of the Supreme Court as to the binding effect of notice properly served, the Illinois Supreme Court adopted the conclusion of the Appellate Court and chose to in effect affirm the judgment rather than unnecessarily increase its labors by enlarging its hearing docket.

(4) The bad faith doctrine, grudgingly recognized decades ago, is properly given broader interpretation in these days, obviously as a matter of public policy which demands cooperation from the business interests, in hampering high powered gangsters in the disposal of the proceeds of their spectacular burglaries and robberies.

The Federal Courts have sustained this "bad faith" doctrine which existed under the common law, and is a part of the uniform *Negotiable Instruments Act*, and the State Courts have also.

We cite the holdings in *Goodman v. Simmonds, 20 How. 343, 367,*.

> "gross negligence may be evidence of *mala fides*"; *Murray v. Lardner, 69 U. S. 110, 121,* "The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve bad faith. They are the same in effect; *Vermilye v. Adams Express Co., 21 Wall. 138, 146,* 'Bankers and brokers cannot, more than others, when warned of possible or probable danger in their business, shut their eyes and plead a want of knowledge which is wilful;' *Hotchkiss v. National Shoe & Leather Bank, 21 Wall. 354, 359.* "Bad faith which implies guilty knowledge or wilful ignorance"

or the part of the purchaser must appear.

The case of *Morris v. Muir, 111 Misc. (N. Y.) 739,* where the practice of the brokers in so conducting their office that people could apply there and without question being raised dispose of their securities whether stolen or otherwise, correctly states the bad faith rule. This case was affirmed in the Appellate Division on the opinion below. Therein many cases are cited to sustain its finding of bad faith in the case reviewed. Thus:

"The manner in which the defendants conducted their Liberty loan department provided an easy way for thieves to dispose of their plunder. It is a case of 'no question asked'. I do not for one moment wish to charge the defendants with the intention of extending an invitation to bond thefts. They are men of good reputation. I believe it is only necessary to call their attention to the lack of precautionary measures and that the proper remedy will be applied.

"Upon the facts in this case I do not hesitate in arriving at the conclusion that the action of the defendants in buying the bonds amounted to bad faith within the authorities. The defendants were grossly negligent in purchasing the bonds. Although gross negligence does not of itself constitute bad faith as a matter of law, it is evidence from which bad faith may be inferred. *Bipp v. Smith, 137 Wis. 234.*"

"The term 'bad faith' as used in the Statute does not necessarily involve furtive motives *(Ward v. City Trust Co., 192 N. Y. 61, 73)*; it means bad faith in a commercial sense. *Rochester & Charlotte Turnpike Road Company v. Paviour, 164 N. Y. 281, 286.*"

In the latter case, at page 284, the Court says:

"While he was not bound to be on the watch for facts which would put a very cautious man on his guard, he was bound to act in good faith. *(Second National Bank v. Weston, 161 N. Y. 520, 526; Cheever v. Pittsburgh, etc. R. R. Co., 150 N. Y. 59, 66.)* Even if his actual good faith is not questioned, if the facts known to him should have led him to inquire, and by inquiry he would have discovered the real situation, in a commercial sense he acted in bad faith and the law will withhold from him the protection that it would otherwise extend."

Wilful disregard of known facts showing want of title *or wilful evasion of knowledge of the facts amounts to bad faith. Matter of Hopper-Morgan Co., 156 Fed. Repr. 525.*

In *Hallock v. Young, 72 N. H. 416, 419, 420, 57 Atl. 236, 238.*

The Court said:

> "It was said in the leading case on the subject in this country, that 'while he is not obliged to make inquiries, he must not wilfully shut his eyes to the means of knowledge which he knows are at hand • • • for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith.'"

The Supreme Court of Illinois has directly construed the Negotiable Instruments Act and the bad faith rule.

In *Renfrow v. Kramer, 341 Ill. 398, at 406,* it is held:

> "*Sections 52 and 56 of the Negotiable Instruments Act* define a holder in due course. Among other conditions the statute requires that at the time the holder took the paper he had no *notice* of any infirmity in the instrument or defect in the title of the person negotiating it. By *Section 56* of that act it is provided that where one has actual knowledge of any infirmity in the instrument or defect in the title of the one transferring it, or knowledge of such facts as to render his act in taking the instrument one of bad faith, such person is not a holder in due course. Under the law, though there is direct and positive testimony that the plaintiff is a holder in due course, yet if circumstances are shown in evidence which by their fair and reasonable inferences tend to show bad faith as defined in the Negotiable Instruments Act, the question whether the plaintiff is a holder in due course becomes one of fact for determination by the jury. *(Foncannon v. Lewis, 327 Ill. 455.)* In this case there is not only evidence of want of consideration and fraud practiced against the Kramers, but there is also evidence of knowledge on the part of Renfrow at least of such want of consideration."

To the same effect, see, *Bell v. McDonald, 308 Ill. 329, 335.*

We submit that this construction binds the Courts of the United States in passing upon the issues involved in this *Graham v. White-Phillips Co., Inc.*, case.

Moreover, we believe that the Circuit Court of Appeals overlooked its ruling in *C. F. Childs & Co. v. Harris Trust & Savings Bank, 27 Fed. (2nd) 633*, decided in the year 1925, where the holding was first, that the rights of a party taking negotiable instruments in Illinois would be determined according to the laws of this State, and second, that the receipt of the *notice* of the character here involved would prevent the recipient thereof from thereafter becoming a holder in due course.

We further submit that the Court failed to distinguish the case of *Merchants National Bank v. Detroit Trust Company, 258 Mich. 526*, from the instant "bad faith" case, in that in the Michigan case it was clearly proven that the treatment of the bank of notices received in the mail to the effect that securities had been stolen showed an honest purpose on the part of the bank of avoiding if possible the purchase of securities in all cases where notices had been given through the mail of theft having occurred.

The Circuit Court of Appeals also erred in holding that the information which came from the receipt of notice of the theft *had been forgotten*. As no employe but the office boy who hung the notice on the hook had knowledge of its contents, and certainly the person conducting the purchase had no such knowledge, there was nothing to forget. If the notice in itself was not sufficient to disqualify the ownership of the respondent, then we submit that the

knowledge by the respondent that such notices that came to its offices advising it of bonds and securities with certain serial numbers having been stolen from the rightful owner, and warning the respondent not to purchase the same, were never called to the attention of the employes of the respondent and never given any consideration, and never served as a deterent to the purchase of such securities, constituted knowledge of such facts that respondent's action in acquiring instruments which it had been definitely advised were stolen instruments, amounted to bad faith towards the public and towards the true owners of such securities.

Incidentally, the opinion of the Circuit Court of Appeals in the instant case is markedly suggestive of the desirability of a review by the Supreme Court, and further, the Circuit Court of Appeals in this case "decided an important question of local law in a way probably in conflict with local decisions" and the character of reasons that we have urged for the granting of the prayer of the petition manifestly come within those referred to in numbered *paragraph 5, sub-paragraph (b) of rule 38.*

Wherefore, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

JAMES J. BARBOUR and
W. EDGAR SAMPSON,
Attorneys for Richey V. Graham, Petitioner.

April, 1935.

APPENDIX.

The Statutes Involved.

United States Code Annotated, Title 28.

Section 347. (Judicial Code, Section 240, amended.) Certiorari to Circuit Courts of Appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from Circuit Courts of Appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

Smith-Hurd Illinois Statutes, Chapter 98, Negotiable Instruments, Article IV.

72. Who is a holder in due course.] §52. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

75. When title is defective.] §55. The title of a person who negotiates an instrument is defective within the

meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

76. Notice of defect—What is.] §56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of such facts that his action in taking the instrument amounted to bad faith.

78. When instrument subject to original defenses.] §58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But the holder who derives his title through a holder in due course, and who is not himself a party to any fraud or duress or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder.

79. Who is deemed holder in due course.] §59. Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

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IN THE

Supreme Court of the United States

October Term, 1935.

No. 29

RICHEY V. GRAHAM,
Petitioner,

v.

THE WHITE-PHILLIPS COMPANY, INC.,
Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S BRIEF.

MR. JAMES J. BARBOUR,
Chicago, Illinois.

MR. W. EDGAR SAMPSON,
Springfield, Illinois,
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Petitioner.

Petition for Certiorari Filed April 23, 1935.
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IN THE

Supreme Court of the United States

October Term, 1935.

No. 29

RICHEY V. GRAHAM,

Petitioner,

v.

THE WHITE-PHILLIPS COMPANY, INC.,

Respondent.

PENDING ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioner, Richey V. Graham, on May 27, 1935, was, by this Honorable Court granted a writ of *certiorari* to the Circuit Court of Appeals for the Seventh Circuit to review the judgment entered by that Court on December 8, 1934 (R. 152) (rehearing denied on January 28, 1935, R. 153), reversing the decree of the District Court of the United States for the Southern District of Illinois, Southern Division, entered December 1, 1933 (R. 113-4), in favor of petitioner and against respondent, awarding

to the petitioner eight $1000 Illinois Highway Bonds theretofore stolen from his home in Cook County, Illinois, and subsequently purchased by the respondent, after the petitioner had given written notice by mail to the respondent of the said bonds having been stolen from his home.

The Petition for the writ of *certiorari* fully sets forth the facts in issue and the points assigned as error, as well as argument in support thereof.

The petitioner, desiring to amplify the reasons which he believes call for a reversal of the judgment of the Circuit Court of Appeals, now presents his Brief and Argument and submits the following for the consideration of the Court:

The Findings of Fact and Conclusions of Law (R. 105-110) were signed by Honorable Charles G. Briggle, Judge, and entered of record on December 1, 1933, without written opinion.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 144-152) is reported in *74 Fed. (2d) 417*.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 8, 1934 (R. 152). Rehearing petition was filed on December 26, 1934 (R. 153), and denied on January 28, 1935 (R. 153). The jurisdiction of the Court is invoked under *Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Sec. 347-a, Title 28 U. S. Code). Certiorari* was granted May 27, 1935, upon a petition filed April 23, 1935.

QUESTIONS PRESENTED.

1. Whether, as a matter of law, The White Phillips Company, Inc., respondent, by reason of having actually received, prior to its purchase on September 22, 1930, of eight $1000 Illinois Highway Bonds from one J. A. Connolly, a notice that the same had been stolen from Richey V. Graham, failed to become a holder thereof in due course.

2. Whether the denial by the Supreme Court of the State of Illinois of a writ of *certiorari* upon the application of *Madison and Kedzie State Bank, Petitioner, v. Northwestern National Bank, Respondent,* to review and determine the judgment entered by the Appellate Court of Illinois, of the First District, did not under the holdings of said Supreme Court of Illinois, constitute an approval of the conclusion reached by the said Appellate Court of Illinois, First District, and whether the said action of the Supreme Court of Illinois, was not under its holdings, in effect, an affirmance of the judgment of the said Appellate Court in the cause of *Northwestern National Bank v. Madison & Kedzie State Bank,* reported in *242 Illinois Appellate Court Reports, at page 22.*

3. Does not, by reason of the denial of the said application for writ of *certiorari* by the Supreme Court of Illinois the conclusion reached by the Appellate Court of Illinois in *Northwestern National Bank v. Madison & Kedzie State Bank, 242 Ill. 22,* govern the decision of the Courts of the United States involving the same point with reference to causes of action arising within the State of Illinois, and hence is it not decisive of this cause now before the Court on writ of *certiorari?*

4. Whether, under the provisions of the *Illinois Negotiable Instruments Act*, the action of The White-Phillips Co., Inc., in adopting the policy of disregarding, ignoring and treating as "junk" all notices descriptive of bonds, securities or negotiable instruments that had been stolen, coming to it from the true owners thereof, so that no reference would be made to said notices at any time to ascertain whether or not the securities which the respondent was daily purchasing were listed on these notices as stolen, did not make the respondent guilty of bad faith in purchasing the bonds stolen from Richey V. Graham, inasmuch as the respondent prior to the purchase received printed notice of said bonds having been stolen, and gave no consideration to the information contained in said circular, but on the other hand wilfully disregarded it.

5. Whether the respondent The White-Phillips Co., Inc., did not at the time of the purchase of the bonds in question have knowledge of such facts that its action in taking such securities amounted to bad faith.

6. Whether the respondent has fully met the burden of proof requirement to the extent of establishing that none of its staff charged with responsibility of receiving notices, or buying bonds, had knowledge of petitioner Graham's ownership.

THE STATUTES INVOLVED.

The Statutes involved will be found in the Appendix, *infra*, pp. 36, 37.

STATEMENT.

THE FACTS. The petitioner, Graham, placed the 35 $1000 Illinois Highway bonds in a safe in his home. Burglars stole them on or about September 2, 1930. He immediately gave notice of the theft to the Foreman State Corporation and to others. Pursuant to its custom the Foreman Company mailed a report of this theft to a list of municipal bond dealers on or about September 5th. The Chicago branch of the respondent was on Foreman's mailing list.

Respondent is a dealer in municipal bonds with its principal office in Davenport, Iowa, and a branch office in Chicago.

Eight of the thirty-five stolen bonds were subsequently acquired by respondent from J. A. Connolly of St. Paul who, on September 13, 1930, wrote to the Chicago branch asking for bids on eight of these Illinois Highway bonds which had been stolen from Graham, giving the maturity dates. On the 16th, respondent's Chicago office wired a bid which was promptly accepted. Directions were given to ship the bonds to Davenport, but, accompanied by a sight draft payable to a Chicago bank, they were sent by Connolly to Chicago on September 22nd, and payment was promptly made by the Chicago office. The bonds were then sent to the Davenport office and received by it on September 23rd.

The case turns upon the matter of respondent's knowledge. It appears that when the bonds arrived in the Davenport office and were lying upon the desk of a clerk, that employee went to a pencil sharpener near by, and

while he was sharpening a pencil his eye chanced to fall upon the notice of a list of stolen bonds which hung upon a nearby wall hook. Observing that Illinois Highway bonds appeared thereon he recalled that such described bonds were on his desk. Upon examining the numbers of these bonds he discovered that they had been stolen. He notified the Chicago office which in turn tried to recover the purchase price from Connolly. Connolly was sent to jail where he died. No money was recovered, but the respondent immediately used the bonds as collateral to secure a loan from a Davenport bank.

There is evidence that both the Chicago and Davenport branches had in the past received notices of stolen bonds. It was the practice in the Chicago branch to place them in a drawer. The Davenport branch placed them on a hook. There were no directions to the employees as to the handling of them, and no settled policy was pursued in bringing such notices to the attention of the office; nor were tabulations or records kept of such lists; nor were they examined before bonds were purchased. No employee was instructed to note, record or circulate the contents of the lists.

In Davenport, the office boys in charge of the mail put the lists on the hook "because they didn't know of anywhere else to put them," and they also put other papers on the same hook.

(The foregoing is largely an abbreviation of the statement of facts by the Court of Appeals.)

The testimony of each witness called by respondent emphasizes so shockingly the lack of good faith toward the general public in the matter of guarding against buy-

ing stolen securities from thieves, and the contemptuous ignoring of all notices of stolen bonds being extant, that we quote liberally from the testimony in that regard.

It more than sustains the strong findings made by the Master in Chancery and the District Court that the purchase of the bonds in question was made in bad faith, and the findings of the Circuit Court of Appeals to the effect that there was no attention paid to printed notices that came in respondent's mail telling of the stealing of securities and warning against their purchase if presented.

This testimony follows:

Blair Phillips, President:

> Prior to the purchase of these bonds we never attempted to advise each office of such notices (R. 33).

Robert Alexander, Vice-President (Rec. 34-35):

> "There was not any custom or practice in our Davenport office of advising any member of the force of the receipt of notices of this character. If one of those mimeographed or printed notices came in the mail in our Davenport office, I don't know what became of it. There was no established method of handling. And I know of no instructions or orders in our office with respect to communicating with anybody in authority the fact of the receipt of notices of this character" (R. 35).

Carl Stutz, Secretary and bond buyer, in the Davenport office (R. 78-9-80):

> "There was nobody in the office whose business it was to refer to the information that had come in as to what was stolen."

Roy Crowe, stenographer employed by White-Phillips Company at Davenport:

"I have no recollection about the time that this paper came into the office.

"In the Davenport office if notices came in from various places that bonds had been stolen the notices were put on a clip on the glass around there. There was no custom or practice of circularizing that notice among the persons in the office, and there was no duty or custom on the part of anybody in the office of familiarizing themselves with these notices" (R. 39).

Vernon Ehlers:

* * *

"I have general supervision of the Davenport office. I handle all banking, all confirmations to customers, all correspondence with salesmen, etc., and those were my general duties in 1930" (R. 43).

"Sometimes there was consultation by wire, correspondence or otherwise between the Chicago office and the Davenport office in regard to the purchase of bonds before the purchase was effected, but this did not occur all the time" * * * (R. 44).

"The general and customary routine of the Davenport office with reference to the receipt of mail was that the first thing in the morning Mr. Offerman assisted by Mr. Drumm opened the mail" (R. 45). "It is my knowledge no instructions had been given to Offerman or Drumm or anyone else in the office with reference to stolen bond notices. If there had been any such instructions I think I would have known it. * * *

"There was no duty in the Davenport office with reference to anyone familiarizing himself or herself with the contents of that clip or hook. It was purely accidental that I detected this notice. * * *

"In the Davenport office there was no custom or routine with reference to the handling of stolen bond notices. * * *

"I could not say how many such notices came to our office, but every so often a notice of such type

would come through. Some of them would be ten or twelve legal-sized sheets in fine print listing bonds, numbers, coupons and all sorts of securities. I recall the list that was mailed out in connection with the robbery of a bank at Lincoln, Nebraska" (R. 46). "It was very voluminous. * * * On that clip the boys put any miscellaneous notices of any sort; most any ordinary junk that came into the office was hung on that hook. I have seen traffic posters and warnings—most anything might be on that hook. It was a clip for what junk came into the office and the boys opening the mail did not call it to the attention of anybody. Could not say how long it stayed there. I imagine when it got full it was taken off and destroyed. I simply saw this notice by accident because I happened to be sharpening a pencil" (R. 46).

"In the Chicago office they don't make a record of such notices, but they do file the list, I understand. They don't make a habit of checking over that list whenever they buy a bond. * * * It is possible to hire an employee to keep track of the notifications of bonds stolen and check that list before purchases are made." * * * (R. 47).

Ernest Bell, assistant secretary, in the Chicago office, paying and delivering bonds we bought (R. 49).

"We have received notices of securities having been stolen and those notices are in a nature of a warning not to purchase the stolen securities. All notices I ever received in the Chicago office covered bonds not dealt in by us and did not contain municipal bonds. I never received a notice with reference to municipal bonds. When notices came into our office we put them in the drawer with the other miscellaneous matter and disregards those notices. I have since ascertained that Connolly was convicted of transporting stolen bonds in the mail, and died in prison.

I know the Foreman State Corporation, but have never seen any notifications coming from the Foreman

> State Corporation with respect to stolen securities. Notices as to securities having been stolen would come in after they are sent out to us but not with great frequency; they would come very rarely and not at all on municipal bonds. I don't know any reason why notification would not come to our Chicago office of municipal bonds having been stolen" (R. 54).

Mr. Bell's entire testimony clearly shows he was a dishonestly inclined witness, seeking to adjust his testimony to the exigencies and perils of his employer's case. Furthermore, it does not appear that he was qualified to speak from his own actual knowledge, when he asserted that notices of thefts of municipals did not come to the Chicago office. The truth undoubtedly was that all notices were filed away without being first called to his attention.

Arno Schriefer, legal and office work, Chicago office:

> "The bonds were left with me, and a check given in payment. No attempt was made by looking up records or anything else to find out whether those bonds were stolen or have information at hand when the bonds should be presented to check up on them. We might have received notice that securities had been stolen. * * * When those bonds were presented, we did not make any effort to find out whether they were stolen when I purchased them, and I don't remember seeing Mr. Bell do it" (R. 40-1-2-3).

Master in Chancery Edward P. Allen found that copies of the notices entitled "Stolen Bonds" were mailed by the Foreman State Corporation to the White-Phillips Co. Inc., at its Chicago office and also the main office at Davenport (R. 87), and that the said The White-Phillips Co., Inc., received both of said notices entitled "Stolen Bonds", but that no examination was made of said notices, and no

consideration of the information as contained in said circular was given to it whatsoever, but on the other hand, totally and utterly disregarded (R. 88). He further found

> "that the policy of said The White-Phillips Co., Inc., in the handling of said notices received, either at the Chicago or Davenport offices of said Company, was of such a character that said notices were totally disregarded, and none of the clerks or office force of said Company were instructed to examine or refer to said notices of stolen securities; that the Executives of said Company considered all of said notices of like character as 'junk,' and that no system was followed in the handling of these notices, except in the Chicago office they were placed in a drawer with miscellaneous matters, and in the Davenport office were filed upon a clip, but no reference was made to them at any time to ascertain whether or not the securities which they were daily purchasing were listed on these notices as stolen (R. 88). The District Court found that no effort was at any time made by said respondent, either by consultation of the records in its office, or otherwise, to investigate or ascertain the title of said J. A. Connolly in and to said bond, or his right to dispose of the same, or to discover whether or not said bonds had been stolen (7th Fact finding p. 107); and (8th Fact finding) that the purpose of the hook or clip in the outer office at Davenport 'among other things was to hold and display notices of stolen securities of the character here involved; but that in said office no one of the employes, officers or agents of said respondent was charged with the duty of making any check upon the contents of such notices so received by said respondent, and no system for conveying or recording or preserving such information as might be contained in such notices and similar notices received at respondent's Chicago offices to the members of the office force of said respondent had ever been put into effect. That said hook or clip was used by the office boy who opened the mail, for the purpose

of holding a variety of circulars, notices as to stolen securities, which were not distributed by the office boy to individuals in the office for attention, and there was no policy or custom in said office requiring any one in the office to pay any attention to the said hook or clip or anything it held.' " (R. 107-8.) The Court's Tenth Fact finding is:

That the respondent, The White-Phillips Company, Inc., as a corporate entity, at and before it purchased the aforesaid bonds had, by virtue of the notice so received at its Davenport office, received actual notice that the same had been stolen from the said Richey V. Graham, the true owner thereof; that at the time of such purchase the said mimeograph notice was on the hook or clip hereinbefore referred to; that said notice was in such position that nothing more than a casual glance by a person standing in the vicinity thereof was required to convey information that the bonds here involved had been stolen; and that the failure and neglect of said respondent to observe and learn the contents of such notice prior to the purchase of the securities here involved must be considered as amounting to a wilful and conscious disregard of the rights of the true owners of said securities, the said Richey V. Graham (R. 108-9). The District Court's fifth and final conclusion of law is:

That the respondent, The White-Phillips Company, Inc., by reason of having actually received, prior to its purchase of the securities here involved, a notice that the same had been stolen as hereinabove set forth, did not, by the purchase of said bonds, become a holder thereof in due course, but that at such time the said respondent had knowledge of such facts that its action in taking such securities amounted to bad faith (R. 109-10).

In the decree the District Court adjudged:

> "That the exceptions filed by the respondent The White-Phillips Company, Inc., to the Report of Edward P. Allen, Master in Chancery, to whom this cause was hitherto referred, be and the same are hereby overruled" (R. 113).

The Court of Appeals in concluding its opinion held:

> "In determining this question, we assume that the notices which were sent out by the Foreman Company were received both at Davenport and Chicago; that there was a want of ordinary care upon the part of the Chicago branch in not making more elaborate provision for the dissemination of the knowledge which said notices gave; that in purchasing the bonds appellant paid full value therefor; and at the time it had no actual knowledge they were stolen; that it made no investigation to ascertain whether the said bonds were stolen other than to inquire as to the status of the party who offered them for sale; that the information which came from the receipt of such notice of the theft of eight Illinois Highway bonds had been forgotten" (R. 151).

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that

> "the fact that the defeated party sought to review the decision and the Supreme Court of Illinois denied its application for a *certiorari* makes the decision in the case of *Northwestern National Bank v. Madison & Kedzie State Bank*, in the Appellate Court of Illinois, no more authoritative."

2. In holding that the rule announced in *Northwestern National Bank v. Madison and Kedzie State Bank, 242 Ill. App. 22*, had not been approved and passed on by the Supreme Court of Illinois by virtue of its having passed

on and denied application for a writ of *certiorari* to review said action of said Appellate Court in said cause.

3. In holding that the action of the highest Court of Illinois in approving the conclusion reached by the Appellate Court of Illinois in the case of *Northwestern National Bank v. Madison & Kedzie State Bank, 242 Ill. App. 22,* and the affirmance of said judgment by the Supreme Court of Illinois by reason of its denial of the application for a writ of *certiorari,* as aforesaid, did not govern the Courts of the United States with reference to the same point in the cause of action arising in the State of Illinois in favor of Richey V. Graham and against the White-Phillips Company, Inc., and brought to the District Court of the United States for the Southern District of Illinois, Southern Division, by removal from the Circuit Court of Sangamon County, Illinois.

4. In holding that the printed notice received by The White-Phillips Company, Inc., prior to its purchase of the eight Illinois Highway bonds for $1000 each, that the said bonds had been stolen from and were the property of Richey V. Graham, did not render the said purchase invalid and the said Company liable for the return to said Graham of said bonds as their owner.

5. In holding that the respondent when it purchased said bonds did not have actual knowledge of the infirmity or defect in the title to said bonds anl that the same were the property of Richey V. Graham.

6. In holding that the respondent, The White-Phillips Company, Inc., did not, when it acquired the eight Illinois Highway bonds from J. A. Connolly, have knowledge of such facts that its acts in taking the said bonds amounted to bad faith.

7. In reversing the decree and judgment of the District Court.

ARGUMENT.

I.

The denial by the Supreme Court of Illinois of a Petition for Writ of Certiorari to the Appellate Court of Illinois is an approval of the conclusion reached by the Appellate Court, and, in effect an affirmance of the judgment of such Court.

The decision below appears to be erroneous. We submit that when the Supreme Court of Illinois denied the application for a writ of *certiorari* in the case of *Northwestern National Bank v. Madison and Kedzie State Bank, 242 Ill. App. 22,* it thereby approved *the conclusion reached by the* Appellate Court and the denial of the said writ was in effect an affirmance of the judgment of the Appellate Court. The Supreme Court of Illinois so ruled in the case of *Soden v. Claney, 269 Ill. 98-102,* and a close reading of *People v. Grant, 283 Ill. 391, 397,* shows that the Court still adheres to its ruling in *Soden v. Claney, supra,* as it points out that the case under consideration presented a different case than the one counsel had referred to that had been before the Appellate Court where the Court had denied a writ of *certiorari.*

The Court says in the *Grant case* that the denial of the writ of *certiorari* in the mandamus case therein referred to meant nothing more than "that we approve the conclusion of the Appellate Court that the State's Attorney should have signed and presented the petition".

This Court adopted the ruling of the Illinois State Supreme Court that the denial of a writ of *certiorari* is

an approval of the conclusion reached by the Appellate Court and in effect is an affirmance of the Appellate Court judgment, in the case of *Minneapolis, St. Paul and Sault Ste. Marie Ry. Co., Petitioner, v. John Rock, 279 U. S. 410 (412),* and cited *Soden v. Claney, supra,* and *People ex rel. Hoyne v. Grant, supra,* as establishing that rule of the Illinois Supreme Court. In the same case this Court holds that:

> "Whenever the highest Court of a state by any form of decision *affirms* or denies *the validity of a judgment of an inferior Court,* over which it can by law exercise Appellate authority, the jurisdiction of this Court to review such decision, if it involves a Federal question, will, upon a proper decision, attach."
> *Petitioner v. Rock, supra.*

The Supreme Court of Illinois having in the case of *Soden v. Claney, supra,* definitely ruled that its denial of a writ of *certiorari* to the Appellate Court is an approval by the same Supreme Court of the conclusion reached by the Appellate Court in the case before it, and therefore obviously an affirmance of the judgment, and this honorable Supreme Court of the United States having ruled that, so far as Illinois is concerned, a denial of the writ of *certiorari* to the Illinois Appellate Court is an approval of the conclusion reached by the Appellate Court and in effect an affirmance of its judgment, we cannot accept the respondent's *ipsi dixit,* on page 14 of its brief in opposition to our petition for the writ of *certiorari,* that the affirmance of the Appellate Court judgment in *Northwestern National Bank v. Madison & Kedzie State Bank, supra,* (by way of denial of the *certiorari* writ) was not a construction of the *Negotiable Instruments Act* by the highest Court of our State.

Respondent blows hot and cold when it denies the foregoing proposition, but admits that the writ "denial was

an affirmance of the judgment". Respondent sets up a bogey man in asserting that we contend that the denial of the writ was "An adoption of the reasoning and expression of the Appellate Court." For the purpose of the argument before this Honorable Court, it is immaterial to us what the reasoning and expressions contained in the opinion of the Appellate Court of Illinois are, so long as it is incontrovertible that the sole question presented to the Appellate Court was whether receipt of a list of securities alleged to have been stolen constitutes "actual knowledge" within the meaning of *Section 56 of the Negotiable Instruments Act, at a subsequent date,* of an infirmity or defect in the title of the person then negotiating some of said securities.

Both the losing party applying for the writ and the Appellate Court were in agreement that that was the question involved, and the respondent here has not yet had the temerity to claim that that is not correct. Therefore it surely follows that the Supreme Court of Illinois ruled in *Northwestern National Bank v. Madison & Kedzie State Bank, supra,*

(a) We adopt the conclusion of the Appellate Court; and

(b) We affirm the judgment of the Appellate Court; and consequently

(c) We deny a writ of *certiorari.*

We make bold to assert, therefore, that:

II.

The conclusion reached by the Appellate Court of Illinois in Northwestern Bank v. Madison & Kedzie State Bank, was adopted by the Supreme Court of Illinois when it denied the Petition for a Writ of Certiorari and affirmed the judgment of the Appellate Court; and that holding, therefore, is decisive of the instant case.

Northwestern National Bank v. Madison & Kedzie State Bank, supra.

III.

It is the holding of the highest State Court of Illinois, that one who purchases a security after he has received notice of infirmity in the instrument, or defect in the title of the person negotiating it, is not a holder in due course.

The Supreme Court of Illinois has uniformly held that notice of a defect in the title to an otherwise negotiable instrument, if previously served upon the party purchasing makes him *not* a holder in due course.

Northwestern National Bank v. Madison & Kedzie State Bank, supra.

(Writ of *certiorari* denied by the Supreme Court, *242 Ill. App. XIV.)*

This is so, because the *Illinois Negotiable Instruments Act* in its several sections uniformly declares that when notice is given of an infirmity in an instrument or of a defect in the title of a holder, the person receiving the notice ceases from the time of receiving of the notice to be a *bona fide* holder of any values to the holder of the instruments not theretofore extinguished by payment or otherwise theretofore satisfied.

Thus by *Section 52* a holder in due course is defined (2) as one who became the holder *"without notice"* that it has been previously dishonored, and (4):

> "that at the time it was negotiated to him he had no *notice* of any infirmity in the instrument or defect in the title of the person negotiating it."

Here are two provisions in one section of the statute that provide that *notice* of a defect in an instrument or in

the holder's title is all that is required to protect the rights of the party complaining and on whose behalf the *notice* has been given. No equivocation or special limited meaning of the word *notice* can be read into this section. It cannot be contended that in addition to *notice* lasting knowledge and memory must be ever present and follow the giving of the *notice.*

(We claim it is obvious that the word "had", as used in *Section 52,* relates to a past event, and that the word "have" is descriptive of present possession, while "must have had" in *Section 56* surely refers to a past or previous acquisition of knowledge or notice.

In other words, had is the past participle of have. Any uncertainty as to the meaning of "had" as used in *Section 52* is clarified by the words "must have been" used in *Section 56.*

The instant case that is before the Court on *certiorari* is certainly one that the Illinois Statute was designed to cover. When the $8000 of bonds were bought from the felon, Connolly, the respondent *had* a printed notice impaled on a hook on its cashier's desk in its main office in Davenport to the effect that those Illinois Highway bonds had been stolen from petitioner Graham. It had also received a similar notice at its Chicago office, but owing to its custom of keeping no track or record of notices so received, some of its employes testified that they knew nothing of such a record. The notice was not ambiguous, and its receipt is admitted, therefore, it "*must have* had actual knowledge of the defect of title".)

Section 54 likewise provides that the receiving of *notice* before the payment of the full amount agreed to be paid therefor makes the receiver person "a holder in due course only to the extent of the amount theretofore paid by him."

Section 56 provides that the notice of infirmity in an instrument or of defect of time must be such *notice* as will be brought home to the party with whom the instrument is negotiated.

Many persons prepare, publish and send out notices of loss by theft, or otherwise, of negotiable instruments belonging to them, and the notice is usually given wide circulation. But unless the notice is proved to have been *received* by the party charged, it is insufficient to defeat the purchaser's holder's title. Therefore the legislature wisely provided in *section 56* that the party to be charged *"must have had actual knowledge of the infirmity or defect."*

This means two things, *i. e.*, (1) the *notice* in its language must be sufficient to bring home *knowledge* to one reading it; and (2) the *notice* that definitely conveys *knowledge* must have been served and *received* by the party.

But real *Notice*—a served *notice*, that by its language conveys the necessary information to the one served is all the *actual knowledge* that the statute requires.

Where a *notice* meeting these requirements has been received by one negotiating for an instrument, he thereafter buys or acquires the instrument at his peril.

This is so held in *Northwestern National Bank v. Madison & Kedzie State Bank, supra, Certiorari* denied by the Illinois Supreme Court, *242 Ill. App. XIV.*

First State Bank v. First Nat. Bank, 314 Ill. 269, 273.

It will be noted that the Court in the last mentioned case uses the word "apprised", in quoting from and construing *Section 54 of the Negotiable Instruments Act.*

To the same effect, *Foncannon v. Lewis, 327 Ill. 455, 461.*

In *Renfrow v. Kramer, 341 Ill. 398, at 406,* it is held:

> *"Sections 52 and 56 of the Negotiable Instruments Act* define a holder in due course. Among other conditions the statute requires that at the time the holder took the paper he had no *notice* of any infirmity in the instrument or defect in the title of the person negotiating it. By *Section 56* of that act it is provided that where one has actual knowledge of any infirmity in the instrument or defect in the title of the one transferring it, or knowledge of such facts as to render his act in taking the instrument one of bad faith, such person is not a holder in due course."

Here again the Supreme Court of Illinois has adhered to the proposition that it is the matter of "notice" that governs the question as to whether a person is a holder, or not, in due course. Seemingly the Court sets up three classifications which disbar a person from being a holder in due course, the first classification being where he has had notice of infirmity or defect. That means a direct communication to him setting forth that the securities which he may later on want to accept, are defective or held by somebody whose title is spurious.

The second classification that the Supreme Court of Illinois undoubtedly evolves from the *Negotiable Instruments Act* is one where regardless of whether or not notice has been given, the recipient has actual knowledge of infirmity in the instrument, or defect in the title.

A third classification made by the Court is one where the recipient has knowledge of such facts as to render his act in taking the instrument one of bad faith.

We call special attention to the wording of the opinion in *Renfrow v. Kramer*, just cited, where it says:

> "Among other conditions the statute requires that at the time the holder took the paper *he had no* notice of any infirmity of the instrument or defect in the title of the person negotiating it."

How can the language of the Statute, and the wording of the foregoing opinion as well, be so distorted as to make it appear that on September 22, 1932, the White-Phillips Company had no notice of the theft of the bonds, when the proof shows, and the respondent admits, that it did have such notice theretofore, to-wit, on September 6, 1932, being the notice mailed by the Foreman Bank Corporation at Chicago on September 4th?

The conclusion reached by the Illinois Appellate Court in *Northwestern National Bank v. Madison & Kedzie State Bank, supra*, was that:

> "As a matter of law receipt by a bank on the 5th day of January, 1925, of a circular list of securities alleged to have been stolen from a bank in a sister state constitutes 'actual knowledge' within the meaning of *Section 56 of the Uniform Negotiable Instruments Act*, at a subsequent date, viz., May 9, 1925, of an infirmity or defect in the title of the person then negotiating some of such securities."

The foregoing interpretation of the ruling of the Appellate Court was submitted to the State Supreme Court by the Madison and Kedzie State Bank, the petitioner for the writ, with the statement that "the judgment of the Appellate Court was based solely upon its (that) ruling," and that:

> "The precise point is exceedingly important to the banking and commercial industries of Illinois, in fact to the public at large. It has never been ruled on by this (Ill. State Supreme) Court, or as far as we can determine by any other court in construing the Uniform Negotiable Instruments Act."

See copy of petition for writ of *certiorari* (R. 142, with certificate of Adam F. Bloch, Clerk of said Illinois Court).

And the Appellate Court of Illinois likewise defines the question involved and the conclusion reached in its decision when it sets forth in its opinion:

> "The real question, as we conceive it, is whether on the undisputed fact defendant received said notice in the manner aforesaid, it is chargeable with the actual knowledge of the theft when it received the bonds" (R. 138). * * * "The notice having been received by the proper agent of the bank to receive, open and acknowledge its mail in the line of his duties, we think the bank is estopped from claiming that it did not have actual knowledge of the effect of the bonds it subsequently received. * * * In this view of the case we think upon the undisputed evidence defendant had actual knowledge that the bonds were stolen, and as a matter of law, therefore, was not a holder in due course under the *Uniform Negotiable Instruments Law*. Accordingly, as a matter of law the judgment will be reversed" (R. 139-140).

The notice was undoubtedly received at Davenport on September 6th, and it was placed on the clip at the cashier's cage when the employe of the respondent opened the mail. This we have positive evidence of inasmuch as there is direct testimony of the notice having been mailed on the 4th to both the Chicago and the Davenport offices, and direct testimony of its subsequent finding at the cashier's cage at Davenport.

Therefore, it follows that the respondent had the notice on the 6th, and on every day thereafter up to and subsequent to the time it purchased the bonds from Connolly. In fact it *had* the notice in its files on the 16th of September, when it gave Connolly a quotation on the High-

way bonds that proved when presented to the respondent six days later to be the identical bonds that had been stolen from petitioner. The only reason that we cannot positively assert that the respondent *had* the same notice in its Chicago office every single day from September 5th on is because it was given no attention when received in the mail. No occupant in that Chicago office has denied that it was received, and the Courts have found that it was in fact received. Therefore, we emphasize these facts that:

A. THE RESPONDENT HAD THE NOTICE EACH DAY FROM SEPTEMBER 5TH TO 22ND, ON THE CLIP AT ITS CASHIER'S CAGE; and

B. *Renfrow v. Kramer, supra,* holds that the Statute requires that AT THE TIME THE HOLDER TOOK THE PAPER HE HAD NO NOTICE OF ANY * * * DEFECT IN THE TITLE OF THE PERSON NEGOTIATING IT;

C. *Section 52 of the Illinois' Negotiable Instruments Act* defines a holder in due course as:

"A holder who has taken the instrument under the following conditions: * * *

4. THAT AT THE TIME IT WAS NEGOTIATED TO HIM HE HAD NO NOTICE OF ANY INFIRMITY IN THE INSTRUMENT OR DEFECT IN THE TITLE OF THE PERSON NEGOTIATING IT."

What an absurdity it would be to have a statute passed worded similarly to the foregoing paragraph, but with the added qualification,

"unless the person shall have forgotten that he had and still has the notice of defect in his possession, or unless the person shall have purposely ignored and destroyed the notice which he received, in either of which events he will be deemed to be a holder in due course".

What constitutes notice where the term is used in various statutes of Illinois, or is otherwise a requirement of law, is defined in the following Illinois decisions:

Seaverns v. Presbyterian Hospital, 173 Ill. 414, 420.

Simmons v. Roseland Security Vault Co., 331 Ill. 563-574.

Drouineau v. Bank, 244 Ill. App. 251.

First National Bank, Taylorville, v. Kalb, 256 Ill. App. 159.

Peru State Bank v. Waggett, 230 Ill. App. 522.

Tollifsen v. Midle States Inv. Co., 253 Ill. App. 320.

Housh v. Tolson, 254 Ill. App. 126-132-134.

Metcalf v. Draper, 98 Ill. App. 399-404.

So that it seems a certainty:

(1) That the Illinois Legislature made the serving of notice of the infirmity or defect of title to a negotiable instrument complete protection to the true owner of the instrument, against a subsequent purchaser of stolen securities who had therefore received a copy of the notice.

(2) The Supreme Court of Illinois has repeatedly defined what method of service of notice is sufficient to bind a corporation; and

(3) When the Appellate Court in the case of *Northwestern National Bank v. Madison & Kedzie State Bank, supra*, followed the wording of the Statute and the holdings of the Supreme Court as to the binding effect of notice properly served, the Illinois Supreme Court adopted the conclusion of the Appellate Court and chose to in effect affirm the judgment rather than unnecessarily in-

crease its labors by enlarging its hearing docket, especially as it had in other cases herein cited adopted the wording of the Statute as setting forth the law of negotiable instruments in Illinois.

IV.

It is now the settled law that the provisions of the Negotiable Instruments Act of Illinois are to be accepted by all Federal Courts as interpreted by the Supreme Court of Illinois.

Burns Mortgage Company v. Fried, 292 U. S. 487.

V.

The Circuit Court of Appeals erred in not accepting the construction given to the Negotiable Instruments Act by the Supreme Court of Illinois.

If we are correct in the foregoing propositions, it follows that the holding in *Northwestern National Bank v. Madison & Kedzie State Bank, supra,* was binding on the District and Circuit Court of Appeal Courts in the instant cause and that the District Court followed the law as to notice as declared by the State Courts of Illinois, while the Circuit Court of Appeals in not following the rulings of the State Courts committed error in their reversal of the decree of the District Court.

Moreover, we believe that the Circuit Court of Appeals overlooked its ruling in *C. F. Childs & Co. v. Harris Trust & Savings Bank, 27 Fed. (2nd) 633,* decided in the year 1925, where the holding was first, that the rights of a party taking negotiable instruments in Illinois would be

determined according to the laws of this State, and second, that the receipt of the *notice* of the character here involved would prevent the recipient thereof from thereafter becoming a holder in due course.

We further submit that the Court failed to distinguish the case of *Merchants National Bank v. Detroit Trust Company, 258 Mich. 526,* from the instant "bad faith" case, in that in the Michigan case it was clearly proven that the treatment of the bank of notices received in the mail to the effect that securities had been stolen showed an honest purpose on the part of the bank of avoiding if possible the purchase of securities in all cases where notices had been given it and received through the mail, or otherwise, of theft having occurred.

Furthermore, the receipt of the notice of theft was denied and the denial was followed by proof that the Bank did not receive the notice. This, the Court held, rebutted the *prima facie* presumption that arises from testimony as to the mailing of the notice, and the defense's evidence in that regard was not met. So that a sufficient answer to the reference to this case is that the fact defense was sustained, and the reversal on appeal was because the plaintiff did not prove its case.

The Circuit Court of Appeals also erred in holding that the information which came from the receipt of notice of the theft *had been forgotten.* As no employee but the office boy who hung the notice on the hook had knowledge of its contents, and certainly the person conducting the purchase had no such knowledge, there was nothing to forget. If the notice in itself was not sufficient to disqualify the ownership of the respondent, then we submit that the knowledge by the respondent that such notices that came

to its offices advising it of bonds and securities with certain serial numbers having been stolen from the rightful owner, and warning the respondent not to purchase the same, were never called to the attention of the employes of the respondent and never given any consideration, and never served as a deterent to the purchase of such securities, constituted knowledge of such facts that respondent's action in acquiring instruments which it had been definitely advised were stolen instruments, amounted to bad faith towards the public and towards the true owners of such securities.

VI.

Under the facts as found by the Master, and by both the District Court and the Circuit Court of Appeals, the respondent was, as a matter of law, guilty of bad faith in acquiring the eight highway bonds, and liable to the petitioner, Graham, therefor.

The facts having been established in the District Court that the respondent received printed notices by mail in both its offices, notifying it that $35,000 of Illinois Highway bonds had been stolen from the residence of petitioner, and that no examination was made of said notices, and no consideration whatsoever was given of the information contained in said circular, but on the other hand, the same was totally and utterly disregarded (R. 88); and that the policy of the White-Phillips Co., Inc., was to disregard all notices of stolen securities and to consider them as "junk" and to make no reference to them at any time to ascertain whether or not the securities which they were daily purchasing were listed on these notices as stolen (R. 87-88), and that within less than eleven days after the said notices had been received by the respondent it

offered to, and six days later did, purchase eight of the stolen bonds from J. A. Connolly, a non-resident stranger; and that no effort was at any time made by said respondent (W-P Co.), either by consulting the records of its office, or otherwise, to investigate or ascertain the title of Connolly in and to said bonds, or his right to dispose of the same, or to discover whether or not said bonds had been stolen (R. 107), established as a matter of law that the respondent under the provisions of *Sections 52, 54 and 56 of the Illinois Negotiable Instruments Law* was not a holder in due course of the eight bonds in good faith; and that at the time of the negotiation it had received

> "*Notice of an infirmity in the instrument or* (and) *defect in the title of the person negotiating the same, and the respondent had actual knowledge of the infirmity or defect* (in that it had received the circular notification of the bonds having beeen stolen), *and knowledge of such facts* (to wit: its policy of disregarding such and all other like warnings) *that its action in taking the instrument amounted to bad faith.*"

The words in italics are the words used in *Section 56 of the Illinois Negotiable Instruments Act.*

And the Master in Chancery in his report, and the District Court in its Findings of Fact and Conclusions of Law, both so found.

The wording of *Section 56 of the Illinois Statute* defining "What is notice of defect" is in the past tense, *i. e.*, "the person to whom it is negotiated must *have had* actual knowledge of the infirmity or defect," and we submit that the language and effect of the statute cannot be evaded by showing that the party receiving the instru-

ment *had had* knowledge of the defect in the instrument he subsequently purchased, but that as a matter of business policy he cast aside and ignored the notice.

The Supreme Court of Illinois has directly construed the *Negotiable Instruments Act* and the bad faith rule.

In *Renfrow v. Kramer, supra,* it is held:

> "If circumstances are shown in evidence which by their fair and reasonable inferences tend to show bad faith as defined in the *Negotiable Instruments Act.* the question whether the plaintiff is a holder in due course becomes one of fact for determination by the jury. *(Foncannon v. Lewis, 327 Ill. 455.)* In this case there is not only evidence of want of consideration and fraud practiced against the Kramers, but there is also evidence of knowledge on the part of Renfrow at least of such want of consideration."

To the same effect, see *Bell v. McDonald, 308 Ill. 329, 335.*

VII.

The Bad Faith Rule.

The bad faith doctrine, grudgingly recognized decades ago, is properly given broader interpretations in these days, obviously as a matter of public policy which demands cooperation from the business interests, in hampering high powered gangsters in the disposal of the proceeds of their spectacular burglaries and robberies.

The Federal Courts have sustained this "bad faith" doctrine which existed under the common law, and is a part of the uniform *Negotiable Instruments Act,* and the State Courts have also.

We cite the holdings in *Goodman v. Simmonds, 20 How. 343, 367,*

"gross negligence may be evidence of *mala fides*"; *Murray v. Lardner, 69 U. S. 110, 121,* "The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve bad faith. They are the same in effect; *Vermilye v. Adams Express Co., 21 Wall. 138, 146,* 'Bankers and brokers cannot, more than others, when warned of possible or probable danger in their business, shut their eyes and plead a want of knowledge which is wilful;' *Hotchkiss v. National Shoe & Leather Bank, 21 Wall. 354, 359.* 'Bad faith which implies guilty knowledge or wilful ignorance'"

on the part of the purchaser must appear.

The case of *Morris v. Muir, 111 Misc. (N. Y.) 739,* where the practice of the brokers in so conducting their office that people could apply there and without question being raised dispose of their securities whether stolen or otherwise, correctly states the bad faith rule. This case was affirmed in the Appellate Division on the opinion below. Therein many cases are cited to sustain its finding of bad faith in the case reviewed. Thus:

"The manner in which the defendants conducted their Liberty loan department provided an easy way for thieves to dispose of their plunder. It is a case of 'no question asked'. I do not for one moment wish to charge the defendants with the intention of extending an invitation to bond thefts. They are men of good reputation. I believe it is only necessary to call their attention to the lack of precautionary measures and that the proper remedy will be applied.

"Upon the facts in this case I do not hesitate in arriving at the conclusion that the action of the defendants in buying the bonds amounted to bad faith

within the authorities. The defendants were grossly negligent in purchasing the bonds. Although gross negligence does not of itself constitute bad faith as a matter of law, it is evidence from which bad faith may be inferred. *Bipp v. Smith, 137 Wis. 234.*"

"The term 'bad faith' as used in the Statute does not necessarily involve furtive motives *(Ward v. City Trust Co., 192 N. Y. 61, 73);* it means bad faith in a commercial sense. *Rochester & Charlotte Turnpike Road Company v. Paviour, 164 N. Y. 281, 286.*"

In the latter case, at page *284*, the Court says:

"While he was not bound to be on the watch for facts which would put a very cautious man on his guard, he was bound to act in good faith. *(Second National Bank v. Weston, 161 N. Y. 520, 526; Cheever v. Pittsburgh, etc. R. R. Co., 150 N. Y. 59, 66.)* Even if his actual good faith is not questioned, if the facts known to him should have led him to inquire, and by inquiry he would have discovered the real situation, in a commercial sense he acted in bad faith and the law will withhold from him the protection that it would otherwise extend."

Wilful disregard of known facts showing want of title *or wilful evasion of knowledge of the facts amounts to bad faith. Matter of Hopper-Morgan Co., 156 Fed. Repr. 525.*

In *Hallock v. Young, 72 N. H. 416, 419, 420; 57 Atl. 236, 238,* the Court said:

"It was said in the leading case on the subject in this country, that 'while he is not obliged to make inquiries, he must not wilfully shut his eyes to the means of knowledge which he knows are at hand • • • for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith.'"

VIII.

The Burden of Proof.

The proof is overwhelming that nobody connected with the respondent made it his business to make note of warnings that securities had been stolen and should not be purchased. But the defendant sought to prove good faith by calling certain of its employes and proving by them that they, said witnesses, had not seen the notices that had been sent to the firm notifying it that the Highway bonds in question had been stolen from the petitioner.

This leads to a discussion of the doctrine of the Burden of Proof. Respondent has heretofore conceded that the burden was upon it to establish good faith. This is so by reason of *Section 59 of the Illinois Negotiable Instruments law (Par. 79, Chap. 98. Cahill's Illinois Statutes—1933)*, which is in part as follows:—

> "Every holder is deemed *prima facie* to be a holder in due course; but when it (is) shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."
>
> *Security v. American Trust & Savings Bank, 162 Ill. App. 76.*

And it did not meet that burden. As already indicated, in September of 1930 it had 27 officers and employees in the Davenport office, and 5 or 6 in the Chicago office. But out of all that number it called but 11 witnesses to testify to its want of knowledge of the rights of the true owner at the time of the purchase of the bonds in suit. Aside from its President it called 6 from the Davenport

office, and 4 from the Chicago office. Where were the others of its officers and employees? There was no evidence that the ones called were the only persons connected with respondent who had authority to receive notices of stolen bonds, or to buy bonds, or even that it had called all those who had to do with this particular purchase. How then can respondent now be heard to say that it successfully carried the burden of showing its good faith as regards this transaction? It had the facilities to protect the rights of the true owner of these bonds. It had installed a device for the receipt of notices of stolen bonds, and had received a printed notice of the theft of the particular bonds here involved. For at least ten days prior to the purchase that notice in bold characters hung upon the wall in the Davenport office at the very place provided for notices of that kind. There is absolutely no evidence that such notice had not been read and its contents duly noted and learned, by at least 21 of the officers and employees working in and out of the Davenport office, including persons duly authorized to buy bonds of this character. Could all these persons, who were not called as witnesses wilfully and deliberately close their eyes to that which they actually knew? And in the absence of proof that they did not know, how can respondent now successfully claim that it has carried the burden of showing its good faith?

The respondent heretofore has mistakenly relied on the case of *National Bank v. Uptown State Bank, 273 Ill. App. 401.* There it is held that "the evidence does not show specifically that a copy (of the bulletin giving notice of stolen bonds) was mailed to defendant" (p. 405).

Furthermore, and notwithstanding, the Court also held that the defendant was not a holder of the bonds in due course, it having received actual notice that the bonds were stolen while it had the bonds in its possession, and before it had paid out any of the proceeds of the loan. And the Appellate Court definitely shows that cause is entirely different from the instant case by the final paragraph in the decision *(408)*:

> "Finding of fact: We find as a fact that defendant, having in its possession the proceeds of the loan of $3,980, and the four bonds at the time it was notified that the bonds were stolen, is not a holder in due course of the bonds."

The judgment of the United States Circuit Court of Appeals, because of the reasons and errors assigned, should be reversed.

Respectfully submitted,

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APPENDIX.

The Statutes Involved.

United States Code Annotated, Title 28.

Section 347. (Judicial Code, Section 240, amended.) Certiorari to Circuit Court of Appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from Circuit Courts of Appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

Smith-Hurd Illinois Statutes, Chapter 98, Negotiable Instruments, Article IV.

72. Who is a holder in due course.] §52. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

75. When title is defective.] §55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

76. Notice of defect—What is.] §56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of such facts that his action in taking the instrument amounted to bad faith.

78. When instrument subject to original defenses.] §58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But the holder who derives his title through a holder in due course, and who is not himself a party to any fraud or duress or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder.

79. Who is deemed holder in due course.] §59. Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1935.

No. 29

RICHEY V. GRAHAM,

Petitioner,

v.

THE WHITE-PHILLIPS COMPANY, INC.,

Respondent.

Certiorari to the United States Circuit Court of Appeals For the Seventh Circuit.

PETITIONER'S REPLY BRIEF.

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Petition for Certiorari Filed April 23, 1935.
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REPLY ARGUMENT.

I.

By calling attention to the case of *City National Bank v. Bank of the Republic, 300 Ill. at 106-107*, the respondent has made it plain to all concerned that the highest Court in the State of Illinois has adopted its own interpretation of the Negotiable Instruments Law without reference to any prior decisions or alleged claim as to what the law merchant was. The Illinois Supreme Court in this case, which respondent has cited, has set forth in the plainest possible terms that it will construe the act as it is written, and will give to the words their natural and common meaning.

Thereby, with due acknowledgment to the courtesy of the respondent in citing this case, we add it to the citations sustaining our Point 3 on page 18 of our original brief, so that we now present at least four different cases decided by the Supreme Court of Illinois as announcing the law of this State with reference to notice, viz.,

City Nat. Bank v. Bank of the Republic, 300 Ill. at 106-107;
The First State Bank v. First National Bank, 314 id. 269.
Foncannon v. Lewis, 327 id. 455-461;
Renfrow v. Kramer, 341 id. 398 at 406;

and

Northwestern National Bank v. Madison & Kedzie State Bank, 242 Ill. App. 22, writ of certiorari denied by the Supreme Court, 242 id. XIV.

Because on close analysis the case sustains our contention as to the effect of the service of the notice prescribed by the Illinois Statute, we add *National Bank v. Uptown State Bank, 273 Ill. App. 401,* and along with it the other cases that respondent fails to appreciate sustain our interpretation of the effect of the service of the notice prescribed by the *Illinois Negotiable Instrument law:*

Drouineau v. First National Bank, 244 id. 251;
Chicago Auto Sales Company v. Peters, 221 id. 363;
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City of Decatur v. Beston, 169 id. 340;
Peterson v. Emery, 154 Ill. App. 294;
Knolt v. Cartwright, 202 id. 502;
C. R. I. & P. Ry. Co. v. Hamler, 215 Ill. 525.

II.

City Bank v. Bank of the Republic, supra, holds:

> "Illinois adopted the Negotiable Instruments Law in 1907.
>
> "It grew out of recommendations made by the Commissioners for Uniform Laws, in 1896, at which time these representatives of the various states recommended the uniform act, which has been adopted by at least 46 of the states since 1896."

Therefore, we claim that decisions prior to statutory enactment should not control where they are in conflict with the plain wording and intent of the subsequently enacted statute.

Thus our own Court, in the case above cited, says (p. 106-107):

> "The confused state of the law before the adoption of the Negotiable Instruments law would naturally bring some of its provisions in conflict with the statutes and decisions of the several States. In construing the act the language ought to be interpreted in such a way as to give effect to the beneficent design of the legislature in passing an act for the promotion of harmony in the law regarding negotiable paper. *THE COURT MUST TAKE THE ACT AS IT IS WRITTEN AND SHOULD GIVE TO THE WORDS THEIR NATURAL AND COMMON MEANING.* The law was enacted for the purpose of furnishing *in itself* a certain guide for the determination of all questions covered thereby relating to commercial paper and so far as it speaks without ambiguity as to any such question, *reference to case law as it existed prior to the enactment is more likely to be misleading than beneficial.* If the provisions of the act harmonize with the general

principles of commercial law in force before its enactment those principles should be followed, but if the language of the act conflicts with statutes or decisions in force before its enactment the courts should not give the act a strained construction in order to make it harmonize with earlier statutes or decisions. If this is done the very purpose of the act is defeated. In order to keep the law as nearly as may be uniform, the courts of all the States should keep in mind the spirit and object of the law and should give to the language of the act a natural and common construction, so that all might be more likely to come to the same conclusion."

THE LAW MERCHANT, being, as we interpret it, the consensus of decision pronouncements which came to be recognized as the common law, made the matter of the right of a holder of negotiable instruments to have the status of a holder for value turn on the question of knowledge—not of Notice.

When the various states chose to have the rights of holders of commercial paper defined by a statute, rather than by decision law or custom, they adopted a statute which made NOTICE the test, rather than actual knowledge, at the time of the taking of the paper.

While NOTICE can be an element of KNOWLEDGE, one can derive KNOWLEDGE from consciousness of conditions arising in other ways than from direct formal NOTICE.

The British, Federal and various State decision pronouncements and policies and doctrines, rendered prior to the date of statute enactments, must yield and give way to the plain intent and meaning of the wording of the statute, which is the governing and controlling factor in interpreting the facts involved.

Attention is called, with emphasis, to the frequent admissions and apologies by the respondent, involved in the citation of cases decided many years ago.

The respondent, we think, has signally failed in its efforts to justify an ignoring of the statutory law of the twentieth century by profuse quotations from English and American decisions of 1836, 1857 and later years in the 19th century.

Its brief also fails to note the difference between the reason for the rule that governmental currency is subject to a different rule than commercial paper in that currency has but one maker, one general design and definite series of amounts, while the latter has different makers, and payees, different dates of issue and maturity, and amounts and terms and places of payment—the latter being easily susceptible of detection, the former very difficult.

III.

Again the Respondent in the discussion of its Point B (page 12), misinterprets the decisions in both *Paine v. Sheridan Trust & Savings Bank, 342 Ill. 342,* and in *Northwestern Nat. Bank v. Madison and Kedzie State Bank, 242 Ill. App. 22.*

In the former case, no question of law was necessary to be passed on adversely by the Supreme Court, because, assuming that the higher Court was bound, as it was; by the finding of the Appellate Court as to what was the ultimate fact involved, it found itself in agreement with the Appellate Court as to what the law was as applied to such ultimate fact. The case turned upon the proposition, so the appellant claimed, that arriving

at the ultimate fact by the Court below involved principles of law the correctness of which the upper Court had the right to go into, in order to upset the ultimate fact finding. It was only by a reversal of the ultimate facts found, that the Supreme Court could disturb or reverse the decision of the Appellate Court. But the Supreme Court held that it was bound by the ultimate facts, as found by the Appellate Court, and it then laid down the law as applicable to those facts, which finding at the middle of page 349 is as follows:

> "Persons dealing with an assumed agent are bound, at their peril, not only to ascertain the fact of the agency but the extent of the agent's authority. They are put upon their guard by the very fact that they are dealing with an agent, and must, at their peril, see to it that the act done by him is within his power. (*Foster v. Graf, 287 Ill. 559; Merchants Nat. Bank v. Nichols & Shepard Co., 223 id. 41; Jackson Paper Manf. Co. v. Commercial Nat. Bank, 199 id. 151.*) This rule is particularly applicable where, as here, the agent is contracting in his own personal interest and to the probable detriment of his principal. (*Leigh v. American Brake Beam Co., 205 Ill. 147.*)"

And the Supreme Court followed its decision of the law of the case, on the facts presented to it by the ultimate facts found by the Appellate Court, by the ruling which appears on the last line of the opinion:

> "the judgment of the Appellate Court will be affirmed."

So too, the Supreme Court in the case of *Northwestern National Bank v. Madison & Kedzie State Bank, supra,* passed on the conclusion of law reached by the Appellate Court, upon the admitted, uncontroverted facts

in the case, and by its denial of the writ of *certiorari* in effect and in law said

"the judgment of the Appellate Court will be affirmed."

It should be borne in mind that the case of *Paine v. Sheridan Trust & Savings Bank, supra,* differed from the *Northwestern National Bank v. Madison & Kedzie State Bank case* in this, that the judgment in the Court below in the former case was reversed in the Appellate Court, on the facts, and final judgment on the latter Court's finding entered in that Court. In such cases, the Appellate Court is required, by statute, to "recite in its final order or judgment the facts found." *(342 Ill. at p. 247.)* But not so where the finding of the facts by the Appellate Court does not differ from that of the Court from which the case has been appealed.

In the case of *Northwestern National Bank v. Madison & Kedzie State Bank, supra,* the petitioner for the writ asked for the same upon the legal proposition that the legal conclusion of the Appellate Court, which it, (petitioner), said was

> "As a matter of law receipt by a bank on the 5th day of January, 1925, of a circular list of securities alleged to have been stolen—constitutes 'actual knowledge' within the meaning of *Section 56 of the Uniform Negotiable Instrument Act,* at a subsequent date, viz., May 9, 1925, of an infirmity or defect in the title of the person then negotiating some of such securities." (Petitioner's Brief 22.)

And the Appellate Court likewise defined the question involved and the conclusions reached in its decision when it set forth in its opinion (Petitioner's Brief, 23; Rec. 139-140).

"The real question, as we conceive it, is whether on the undisputed fact that defendant received said notice in the manner aforesaid it is chargeable with actual knowledge of the theft when it received the bonds • • •

"Being a corporation, defendant necessarily acted through its agents. Its knowledge must, therefore, be such as necessarily comes to one of its agents acting in the regular course of his duties • • •

"It becomes a question of law, therefore, whether or not his actual knowledge was that of the defendant corporation which must necessarily acquire knowledge, if at all, through its authorized agents.

"In this view of the case we think upon the undisputed evidence defendant had actual knowledge that the bonds were stolen, and as a matter of law was, therefore, not a holder in due course under the uniform *Negotiable Instruments Law.*"

The respondent has signally failed to divert the issue passed upon by our Illinois Courts that "Notice" constitutes "Knowledge" to its claimed proposition that the Appellate Court was simply deciding a question of fact as to what constitutes Notice. (Contention under B, page 12, Respondent's Brief.) The respondent by its citation of *Paine v. Sheridan Trust and Savings Bank, supra,* has tried, ineffectively we think, to demonstrate that the decision in *Northwestern Nat. Bank v. Madison and Kedzie State Bank, supra,* involved and turned on the consideration of litigated, disputed facts as to whether Notice had been proved; whereas in neither of these two cases were the facts questioned, but the Supreme Court in both cases accepted the fact as to Notice having been given, as found by the Appellate Court, as binding on it, and therefore not the subject of review. While in the *Northwestern Nat. Bank case* the facts were not in dispute in either the trial or the Appellate Courts, but on the contrary the petitioner for the writ of *certiorari*

was submitting the case to the Supreme Court upon the legal proposition that the Appellate Court had erroneously decided the question of law as to the effect of the Statutory provisions as to Notice arising from the admitted facts in the case as they were found by the trial and Appellate Courts.

IV.

What the Appellate Court decided in *Northwestern Nat. Bank v. Madison & Kedzie State Bank, supra,* and what the wording of the Illinois Statute makes incontrovertible is, that *Notice* constitutes *Knowledge.* Under the English cases, followed, in indefinite *dicta,* the decision law did not recognize *Notice* as such an element that would defeat the title of a holder for value.

To illustrate, Lord Herschell, in *London Joint Stock Bank v. Simmons, App. Cas. 219,* at page *221,* is quoted by the respondent at page 29 of its brief in this case, as saying:

> "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments."

Well, all we can say is, that if the distinguished Lord had lived for a decade after saying thus, he would have learned that the doctrine of *Notice* had become a part of the statute Negotiable Instrument law adopted in many of the states.

V.

The respondent is also seeking to becloud the issue by claiming that the questions of forgetting and negligence are involved, and that negligence and forgetting do not constitute in law bad faith.

We have made no such contention as this bogey man that the respondent has set up.

The respondent is further departing from the truth and logic in asserting that we claim that negligence or lack of memory enter into the definition of Bad Faith as applied to the facts in this instant case. Here the bad faith arises from the fact that the respondent "as an established office custom ignored the delivery of the notice of the bonds having been stolen." (Res. brief, in heavy type, top of page 26.)

As we stated in our original brief, it is not a case of forgetting, because one can never forget what it never knew; nor is it a case of negligence, because of such lapse of memory.

It is a case of deliberately resolving that

> "I will instruct my office assistants to close their eyes to, and never consult mail which by any possibility will disclose that bonds which may later be presented to me have been acquired by the proposed seller by theft."

That is what Master In Chancery Allen found to be the facts (R. 88). And that was the finding of the District Court (R. 107-108). Its tenth finding is partly a fact, and partly a law finding, *i. e.*, the fact finding that the respondent at and before the aforesaid purchase of bonds had received actual notice that the same had been stolen from the Petitioner, Graham, etc., and, the conclusion of law at the end of said 10th finding is

> "that the failure and neglect of said respondent to observe and learn the contents of such notice prior to the purchase of the securities here involved must be considered as amounting to a wilful disregard of the rights of the true owners of said securities, the said Richey V. Graham, petitioner herein" (R. 109).

The conclusions of law of the District Court are manifestly correct. That is to say

(4) That the claim of the White-Phillips Co., in and to said securities is subject to and will be determined by and according to the provisions of said *Negotiable Instruments law of Illinois.*

(5) That the respondent, The White-Phillips Company, Inc. by reason of having actually received, prior to its purchase of the securities here involved, a notice that the same had been stolen as hereinabove set forth, did not, by the purchase of said bonds, become a holder thereof in due course, but that at such time the said respondent had knowledge of such facts that its action in taking such securities amounted to bad faith.

(6) That the equities in this cause are with the respondent Richey V. Graham, and a decree should be entered accordingly (R. 109-10).

These findings, and particularly the 10th fact and the 6th and final conclusion of law, amount to a pronouncement by the Court that under the undisputed facts in the case the equities are with the Respondent Graham, and a decree should be entered accordingly.

The Circuit Court of Appeals found the facts essentially the same as the Court and Master below, its particular finding being

> "There were no directions to the employes as to the handling of them (notices) and no settled policy was pursued in bringing such notices to the attention of the office; nor were tabulations or records kept of such lists; nor were they examined before bonds were purchased. No employe was instructed to note, record or circulate the contents of the lists" (R. 145).

The statement of the respondent, White-Phillips Co., on the first page of its brief, that our statement of the case, supplemented by that of the Court of Appeals seems sufficient, and that the facts are correctly stated by the trial Court in the findings of fact, is most significant, and places the case on all fours with the facts upon which the *Northwestern Nat. Bank v. Madison & Kedzie State Bank, supra,* was decided by the Illinois Appellate Court, with the affirmance of the judgment by the Supreme Court by virtue and by reason of its denial of the writ of *certiorari.*

VI.

The Respondent unintentionally entirely misapprehends the effect of the ruling in *National Bank v. Uptown State Bank, 273 Ill. App. 401,* in its comment thereon in its brief at pages 8, 14, 34, 36 and 60. If that case went as far and meant all that counsel claim for it, it would have little, if any, weight so far as concerns the case of *Northwestern Nat. Bank v. Madison & Kedzie State Bank, supra,* as the latter case has all the dignity of an Illinois Supreme Court decision by reason of the Supreme Court's having by its denial of a writ of *certiorari,* affirmed the conclusion and the judgment reached by the Appellate Court.

It is interesting to note that the proviso in *Section 17 of the Appellate Court Act (Par. 49, Chap. 37, Cahill's Illinois Statutes, 1933)* to the effect that the opinions of the Appellate Courts should not be of binding authority in any cause or proceeding other than in that in which they may be filed, was omitted by amendment adopted at the last session of the General Assembly *(Par. 49, Chap. 37, Cahill, 1935; Session Laws 1935, P. 696).*

This *Uptown State Bank case* that the respondent relies upon was an action of trover for the conversion of five

bonds of $1,000.00 each, which had been stolen from the plaintiff (National Bank of the Republic). Typewritten notices of such theft were mailed out on behalf of the plaintiff "but the evidence does not show specifically that a copy was mailed to defendant" (Opinion 405). Later the bonds came into the hands of one Farry, the president of Fidelity Motors Company, and using said bonds as collateral he obtained a loan to said company in the sum of $3,980.00 from defendant bank, the amount thereof being placed on the books of the defendant to the credit of said Fidelity Motors Company. But before any said fund was checked out the defendant learned of the theft. Later, however, the defendant honored checks drawn by the borrower and paid out the said fund. The holding was that since the defendant at the time it received express notice of the theft had paid out nothing, it was not then a holder in due course, and second, that the defendant could acquire no greater rights by its subsequent payment.

And the Appellate Court definitely shows, by the final paragraph in the decision *(408)*:

> "Finding of fact: We find as a fact that defendant, having in its possession the proceeds of the loan of $3,980, and the four bonds at the time it was notified that the bonds were stolen, is not a holder in due course of the bonds,"

that that cause turned on the interpretation of facts different than those in the instant case. Nevertheless, here again is another expression of a Court of Appeal in Illinois to the effect that where the proof has been made of a definite notification of bonds having been stolen, the holder of stolen bonds ceases thereby to be a holder in due course to the extent of the bonds or the proceeds of the bonds in its hands not yet disposed of. It is a deci-

sion which absolutely sustains the notice feature of *Section 54* and we feel warranted in saying that if the losing party had sought a writ of *certiorari* from the Supreme Court and the Supreme Court had denied the writ, such denial would be an affirmance of the judgment and of the conclusion that the Appellate Court reached with reference to *Section 54*, as applied to the finding of ultimate fact that the Appellate Court made, which is on page *408* of the opinion. The suggestion about the cashier of the bank having, when he accepted the bonds as collateral, acted in good faith, was not necessary to the decision of the case, because, while there was a question as to whether or not the notice sent out by the Illinois Bankers Association on April 4, 1930, was received by the Uptown State Bank, it definitely appears by the evidence and was not in dispute, that on July 2, 1930, the Guaranty Trust Company of New York notified the Uptown State Bank that the bonds had been stolen and the Guaranty Trust Company refused to accept the bonds from the Uptown State Bank who had shipped them to New York for redemption at 105, and returned them to the Uptown State Bank because of their being stolen bonds.

So, we submit, that a close study of the facts and law involved in the reversal of the judgment of the trial Court, adds the ruling in *Nat. Bank v. Uptown State Bank, supra*, to those definitely favorable to your petitioner's contention as to the purpose and effect of provisions as to Notice contained in the *Illinois Negotiable Instruments Law.*

The point, as we view it, is, that the question involved is admittedly a matter of the statutory law of Illinois and the meaning of that statute has been expressly declared by the highest Court of the State which has ever

had occasion to pass thereon. And the respondent is now asking the United States Supreme Court to construe the statutory law of Illinois directly contrary to the construction which has been given by the highest Court of this State which has ever had occasion to pass thereon.

And regardless of the general rule relating to denial of *certiorari*, the fact still remains that in this particular case, as the record shows, the Illinois Supreme Court denied a *certiorari* where absolutely the only point involved in the petition therefor was the effect of notice of the precise character involved in this case. In view of this record it would seem that until the Supreme Court of Illinois indicates to the contrary, the rule laid down by the Appellate Court in the *Madison and Kedzie State Bank case* ought to be controlling.

VII.

As to the fallacious reasoning leading to the citation by the respondent of other cases reviewed in Illinois we submit the following comment:

Drouineau v. First National Bank, 244 Ill. App. 251, is a case which we cited in our original brief to sustain our proposition that under the *Negotiable Instruments Law* of Illinois notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he pays for the same will defeat his claim to being a holder in due course, and likewise as stated in *Section 56* of the same Act that to constitute notice of defect the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

The Court held in that case that the notice had not been given and the knowledge had not been acquired, but it bears out our contention that the wording of the statute is unambiguous and means what it says.

Nowhere within the four corners of this case does it sustain the proposition that the statute is merely declaratory of the common law as claimed on pages 3 and 4 of respondent's brief.

The case of *Chicago Auto Sales Company v. Peters, 221 Ill. App. 363,* likewise cited by respondent on page 4 of its brief, does not bear out respondent's claim. The case sets forth the sections of the *Illinois Negotiable Instruments Law* in the same manner that we have repeatedly set it out, and to that extent it bears out our theory and would be a proper citation for this petitioner.

On the merits of the case, the Court decided that the defendant corporation was equitably estopped from contesting the validity of the notice. In no way does the decision aid the point respondent urges.

Crouch v. National Bank, 156 Ill. 342, 357, cited by respondent at page 23 of its brief, has not the remotest bearing on the questions involved in this suit. The Court held that the words, "paid in" contained in an affidavit which was the subject of review were sufficient, the Court saying:

> "We are unable to see that the addition of the words 'in good faith' in this affidavit, would have done more than emphasize what was in fact stated. The affidavit, as made, could not have been true if the contribution of $50,000 was merely colorable."

Cramer v. Burkhalter, 207 Ill. 34, cited on page 13 of respondent's brief, properly holds that whether or not a notice had been given was a question of fact.

City of Decatur v. Besten, 169 id. 340, cited on the same page, is a similar holding.

Peterson v. Emery, 154 Ill. App. 294, and *Knolt v. Cartwright, 202 id. 502*, in no way apply to or sustain respondent's contention, but all the foregoing cases sustain the interpretation of the *Illinois Negotiable Instruments Law* that the Courts of our state uniformly accord it, being also the construction we contend for.

C. R. I. & P. Ry. Co. v. Hamler, 215 Ill. 525, is a willful and wanton negligent case, which holds that "in negligence, merely, there is no intention to do a wrongful act or omit the performance of a duty."

As we view it, the facts in the finding of the District Court show, and the District Court held, that the conduct of the respondent amounted to a willful and conscious disregard of the rights of the true owners of the said securities (Rec. 109).

We submit that "the delivery of the notice of stolen bonds and the ignoring of it by an established office custom," which is the characterization which the respondent gives to its own conduct (its brief 26) shows an intention to wrong the real owners of the securities and to omit the performance of a duty, to-wit, to obey the statute as to the effect of notice.

We regard it as an unnecessary involvement of the attention of the Court to join with the respondent in a discussion of the reasoning or applicability of British or

American cases which were decided long before the passage of the *Illinois Negotiable Instruments Law.*

VIII.

It is obvious that the respondent has attempted in his brief to read out of the *Negotiable Instruments Statute* all provisions making the giving of notice, sufficient to defeat the claim of one subsequently obtaining a security of being a holder in due course.

Its counsel attempts to emasculate the act in such a manner that *Section 52* will be held repugnant to *Section 56*, and therefore of no legal effect, and have the Court hold that that Section requires that the purchaser of a security must have actual knowledge at the time he pays over the money, and that he be then conscious of the fact, that his action in taking the instrument amounts to bad faith, in order to disqualify him as a "holder in due course".

While our position is, that the plain reading and intent of the statute is that the giving of a notice that a definite infirmity or defect in title, set forth in such notice, exists, thereby puts the receiver of such notice in actual knowledge of such facts that his action in taking the instrument amounts to bad faith. Statutes are enacted in the hope that thereby evils and hardships may be avoided, even though under existing law or custom or Court holdings those hardships have theretofore been accorded the dignity of recognized legality.

Respectfully submitted,

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October, 1935.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No. 888 29

RICHEY V. GRAHAM,

Petitioner,

vs.

THE WHITE-PHILLIPS COMPANY, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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IN THE

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OCTOBER TERM, A. D. 1934.

No. 898

RICHEY V. GRAHAM,

Petitioner,

vs.

THE WHITE-PHILLIPS COMPANY, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT.

MAY IT PLEASE THE COURT:

The statement of the case by petitioner, supplemented by the statement made by the Circuit Court of Appeals (Record pp. 144-146) seems to respondent sufficient.

SUMMARY OF ARGUMENT.

I.

Under the law merchant, as administered by the Federal Courts, a party who takes negotiable paper, before due, for a valuable consideration without knowledge of any defect of title and in good faith takes good title. The title can be defeated only by bad faith.

II.

It is present actual knowledge of a defect in the title of the transferor, not past constructive notice of some such defect, which will render the act of the transferee in taking the paper bad faith to the extent of impairing his title.

III.

The original owner of stolen bonds, by circularizing dealers in negotiable securities of the fact of the theft, cannot impose an obligation upon such dealers to read, keep in mind or preserve or search his records for such notices previous to buying bonds offered.

IV.

Circularization of stolen paper, though it appears that circulars were received, but discarded, forgotten, overlooked or negligently handled by a dealer in securities, does not impair the title unless knowledge is shown to have been present to the mind of the purchaser at the time of the purchase.

V.

The Uniform Negotiable Instrument Act as adopted in Illinois, (Petition for Certiorari p. 20), is merely declaratory of the law merchant, in the absence of a contrary construction by the highest court of Illinois.

VI.

The highest court of Illinois is the Supreme Court. The Appellate courts are inferior, intermediate courts.

VII.

The decision of the Appellate Court, First District, Second Division, State of Illinois, in *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22, is not by the highest court of the state, and will not be followed in the Federal Courts.

VIII.

The denial of certiorari by the Supreme Court, does not have the effect of a decision of the highest court, construing the Uniform Negotiable Instrument Act as petitioner claims it was construed in the Appellate Court in the case of *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank* (*supra*).

ARGUMENT.

I.

At the common law, in administration of the law merchant, both in Great Britain and in the Federal Courts, one who took negotiable paper, before due, for a valuable consideration without present actual *knowledge* of any defect in the title of the transferor, and in good faith, took a title good against all the world.

There can be little doubt, after a study of Federal as well as State decisions, that the doctrine approved and applied by the Supreme Court of the United States in 1864, in the case of *Murray* v. *Lardner*, 2 Wall. 110 at 121, settled the Federal law upon the lines laid down in 1842 in *Swift* v. *Tyson*, 16 Pet. 1, and expanded in 1857 in *Goodman* v. *Simonds*, 20 How. 343, and was the general law merchant.

That rule was thus summarized in *Murray* v. *Lardner*, 2 Wall. 110, at page 121.

> "The possession of such paper carries the title with it to the holder:—'The possession and title are one and inseparable'.
>
> The party who takes it before due for a valuable consideration, without *knowledge* of any defect of title, and in good faith, holds it by a title valid against all the world.
>
> Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not

defeat his title. *That result can be produced only by bad faith on his part.*

The burden of proof lies on the person who assails the right claimed by the party in possession.

Such is the settled law of this court, and we feel no disposition to depart from it".

In *Goodman* v. *Simonds*, 20 How. at 365, it is said:—

"If a bill of exchange, endorsed in blank, so as to be transferable by delivery, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen, and afterwards negotiated to one having no *knowledge* of these facts, for a valuable consideration in the usual course of business, his title would be good, and he would be entitled to recover the amount. • • • The word *notice*, as used by this Court, on the occasion referred to, we think must be understood in the same sense as *knowledge*, and indeed that is one of its usual and appropriate significations. • • •". (p. 366).

The "bad faith" referred to in the above excerpt from *Murray* v. *Lardner*, is that state of mind and conduct which implicitly convicts of guilty knowledge, or wilful ignorance.

Hotchkiss v. *Nat. Banks*, 21 Wall. 354 at 359, where it is said:—

"A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, *or even gross negligence* at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or wilful ignorance, and the burden of proof lies on the assailant of the title".

II, III and IV.

To convict of bad faith, it is not enough that it appear that at some former time, antedating the transfer, the transferee had had conveyed to him information that the particular paper had been stolen,—it must appear, in order that *guilty* knowledge be shown, that there was a conscious, present knowledge.

This principle has been adhered to by the British courts, this court and the courts of a large number of the states.

Raphael v. *Bank of England*, (1855), 17 C. B. 161; 139 English Reprint 1030.

In that case Bank of England notes had been stolen and were taken by a broker. The holding was that notice received at some previous time by the transferee, but overlooked or forgotten at the time of transfer, did not convict of bad faith.

In *London Joint Stock Bank* v. *Simmons* (1892), App. Cas. at 219, Lord Herschell approves the opinion of Willes, J., in the *Raphael* case, and at page 221 says:

> "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments".

Lord Field, in the same case, cites the *Raphael* case with approval, and says (page 227):

> "In one of those cases, *Raphael* v. *Bank of England*, the plaintiff had, at some earlier period, received actual notice that the bank note in question had been stolen, but it was established to the satisfaction of the jury that the notice had been forgotten and was not present to his mind at the time of taking, and he was held entitled to recover".

In *Venables* v. *Baring Bros & Co.*, (1892) 3 Ch. Div. 527, Lord Kekewich, said at page 542:

> "Now I come to the question of negligence, I was referred to the case of *Raphael* v. *Bank of England*, 17 C. B. 161, which is certainly a case in point; because there there was a bank note—undoubtedly a negotiable instrument—and it was held that the holder might sue upon it, *notwithstanding that when he took it he had the means at his disposal which would have enabled him to detect the bad title of his transferor; but of which means he neglected to avail himself.* Negligence was there held to be no defense whatever, and I apprehend that principle is really the guide to all the decisions".

In the interim between the *Raphael* case, decided in 1855, and the *London Joint Stock Bank* case, decided in 1892, the Supreme Court of the United States in 1874, had occasion to consider the question of bona fides of a purchaser of stolen securities in *Vermilye & Co.* v. *Adams Exp. Co.*, 21 Wall. 138.

In that case the securities in question were *past due* paper, and notice of the theft had been delivered to Vermilye & Company before that company purchased the paper.

The Court held that Vermilye & Company acquired no title because the fact the paper was *past due* was enough to put them on inquiry, and obligate them to refer to their files to ascertain whether there had been any notice affecting the paper served upon them, but the Court said:

> "By the well settled law of the case they" (bankers) "may purchase such paper *before due* without cumbering their minds or their offices with memoranda of such notices".

The *Raphael* case is not referred to, but it seems clear that the Supreme Court had that case in mind as being "the well settled law of the case".

The trend of the state courts is to the same end.

Merch. Nat. Bank v. *Detroit Tr. Co.*, (1932) 258 Mich. 526; 242 N. W. 739.

Seybel v. *Nat. Cur. Bank*, 54 N. Y. 288.

Heney v. *Sutro*, (1915) 28 Cal. App. 702; 153 Pac. 972.

Gerseta Corp. v. *W. C. Silk Co.*, (C. C. A. 2nd Circ. 1924) 3 Fed. 2nd 236.

Link v. *Jackson*, (1911) 158 Mo. App. 63; 139 S. W. 588 at 593.

Lord v. *Wilkinson*, (N. Y.) 56 Barb. 593.

Beltzhoover v. *Blackstock*, (Pa.) 3 Watts 20.

Eng. Amer. L. & T. Co. v. *Hiers*, (Ga.) 38 S. E. 103.

Halliday v. *Elberton L. & S. Bank*, (Ga.) 128 S. E. 131.

Wildsmith v. *Tracy*, 80 Ala. 258.

Boyd v. *McCann*, 10 Md. 118.

Clark v. *Ricker*, 14 N. H. 44.

Hayden v. *Bowery Nat. Bank*, 6 Lans. 490.

Unaka Nat. Bank v. *Butler*, (1904) 113 Tenn. 574; 83 S. W. 655 at 656.

Pollard v. *Tobin*, 211 Wisc. 405, followed in *Marine Nat. Exch. Bank* v. *Kalt-Zimmers Mfg. Co.*, (1934) ..... U. S. .....; 79 L. ed. 208 at 210-11.

The most recent case in a court of last resort upon the question now under consideration is *Merchants Nat. Bank* v. *Detroit Trust Company*, (Mich. 1932) 258 Mich. 526; 242 N. W. 739, and that Court considers the language of

the United States Supreme Court in the *Vermilye & Company case as stare decisis.*

The Illinois Appellate Court case (*N. W. Nat. Bank* v. *Madison & Kedzie State Bank,* 242 Ill. App. 22), is discussed by the Michigan Court and dismissed with the following comment (242 N. W. 743):

> "As far as we have been able to determine this case stands alone. It estops the purchaser from showing good faith at the time the bonds are acquired. It makes notice of theft conclusive evidence of *mala fides.* It *overlooks* the well established rule" (*i. e.* the rule in the *Raphael* case, which was evidently before the United States Supreme Court in the *Vermilye & Co.* case), "that, though one has received actual notice, if, by forgetfulness or negligence, he does not have it in mind, when he acquires the bonds, he may still be a good faith purchaser".

The Court then cites and quotes from *Lord* v. *Wilkinson,* 56 Barb. (N. Y.) 593, in which it was held that an instruction "that the defendants once having had notice, are bound by it, although the notice may have been forgotten", was erroneous.

V.

The language of Section 56 of the Illinois Uniform Negotiable Instrument Act, (Appendix to petition of petitioner, page 21), is but a crystallization of the law merchant as developed in both Great Britain and the United States. It is a constant principle that when a statute incorporates language which theretofore has received a practically unanimous construction by the courts, it will be presumed that the legislators used the language with the accepted meaning.

Therefore, when the language "notice of an infirmity" and "actual knowledge" was used, it must be presumed that the words should have their defined and established meaning, and so the courts have held as to those words and other language in the Uniform Negotiable Instruments Act.

Peterson v. *Metro. Life Ins. Co.* (Dist. Ct. So. Dist. Ia. 1926) 19 Fed. 2nd, 74 at 85.

Gerseta Corp. v. *W.-C. Silk Co.* (C. C. A. 2nd Circ. 1924) 3 Fed. 2nd 236.

Commercial Nat. Bank v. *Canal-Louisiana B. & Tr. Co.*, 239 U. S. 520 at 528.

City of Adrian v. *Whitney Cent. & Nat. Bank* (1914) 180 Mich. 171; 146 N. W. 654.

City Bank v. *Bank of Republic*, (1921) 300 Ill. 103 at 106.

Link v. *Jackson*, (1911) 158 Mo. App. 63; 139 S. W. 588 at 593.

Unaka Nat. Bank v. *Butler*, (1904) 113 Tenn. 574; 83 S. W. 655 at 657.

Campbell v. *Fourth Nat. Bank*, (1910) 137 Ky. 555; 126 S. W. 114 at 116.

Citizens State Bank v. *Johnson Co.*, (1918) 182 Ky. 531; 207 S. W. 8 at 10.

Bank of Commerce & Sav. v. *Randell*, (1921) 107 Neb. 332; 186 N. W. 70.

Ex parte Goldberg & Lewis, 191 Ala. 356.

Piedmont, etc., R. Co. v. *Shaw*, 223 Fed. 973 at 976.

State Bank v. *Bilstad*, (1912) ..... Ia. ..... 136 N. W. 204 at 205.

Arnd v. *Aylesworth*, (1909) 145 Ia. 185; 123 N. W. 1000 at 1002.

Mass. Nat. Bank v. *Snow*, (1905) 187 Mass. 159; 72 N. E. 959.

Fillebrown v. *Hayward*, (1906) 190 Mass. 472; 77 N. E. 45.

Union Tr. Co. v. *McGinty*, (1912) 212 Mass. 205; 98 N. E. 679.

Morris v. *Muir*, (1920) 181 N. Y. Supp. 913.

Ward v. *City Tr. Co.*, 102 N. Y. Supp. 50.

Drouineau v. *Bank*, 244 Ill. App. 251.

Chi. Auto Sales Co. v. *Peters*, 221 Ill. App. 363 at 367.

VI and VII.

Under the Constitution of Illinois, the Supreme Court is the highest court of the State.

"The judicial powers, except as in this article otherwise provided, shall be vested in the Supreme Court, circuit courts, county courts, justices of the peace, police magistrates, and such courts as may be created by law in and for cities and incorporated towns".

Constitution of Illinois of 1870, Art. VI, Sec. 1.

Appellate Courts.

"After the year of our Lord 1874, inferior appellate courts, of uniform organization and jurisdiction, may be created in districts formed for that purpose, to which such appeals and writs of error as the general assembly may provide may be prosecuted from circuit and other courts, and from which appeals and writs of error shall lie to the supreme court, in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law. Such appellate courts shall be held by such number of judges

of the circuit courts, and at such times and places, and in such manner, as may be provided by law; but no judge shall sit in review upon cases decided by him, nor shall said judges receive any additional compensation for such services".

Constitution of Ill. Art. VI, Sec. 11.

Appellate Courts were created by an act of the General Assembly approved June 2, 1877, one in each of four districts, and by Section 17 of the Act it was provided,

"All opinions or decisions of said court upon the final hearing of any cause, shall be reduced to writing by the court, briefly giving therein, the reasons for such opinion or decision, and be filed in the cause in which rendered: *provided*, that such opinion shall not be of binding authority in any cause or proceeding, other than that in which they may be filed".

Cahill's Ill. Rev. Stat. 1933, Chap. 37, Par. 49, page 918.

Branch Appellate Courts were subsequently authorized, with the same process, pleadings, practice, procedure and powers as the original appellate courts.

Cahill Rev. Stat. 1933, Chap. 37, Pars. 52-64, pp. 918-920.

It was one of these branch courts, known as the Second Division of the First District which decided the case of *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22, and another, known as the First Division of the First District which, in 1934, held *contra* to that case in *Nat. Bank* v. *Uptown State Bank*, 273 Ill. App. 401 at 405.

It was of an opinion of the Appellate Court of the Second District that *Lindley*, Dist. Judge, said in *Hall* v. *Mais*, 34 Fed. 2nd 528 at 530:

> "Furthermore, if there be anything in that case at variance with the court's conclusions here, it should be borne in mind that by the statutes of the State of Illinois (Cahill's Rev. St. 1929, c. 37, par. 49) the decisions of the Appellate Court are, by legislative enactment, forbidden to be accepted as binding precedents, and therefore cannot be accepted by the Federal court as determinative of the law of the State."

See also

Corpus Christi Gas Co. v. *Corpus Christi*, (Dist. Court So. Dist. Tex. 1930) 36 Fed. 2nd 972 at 973.

Wright v. *N. Y. Underwriters Ins. Co.*, 1 Fed. Supp. 663.

VIII.

The major contention of petitioner, however, is that this court is bound to accept as the construction placed upon the Illinois Act by the highest court of Illinois, the opinion of the Second Division of the Appellate Court of the First District of Illinois, in *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22, which has been said to be a case which "stands alone" (*Merch. Nat. Bank* v. *Detroit Trust Co.*, 258 Mich. 526) despite the fact that the First Division of that District has subsequently held *contra* to that decision in *Nat. Bank* v. *Uptown State Bank*, 273 Ill. App. 401 at 405, merely, forsooth, because the Supreme Court of Illinois denied an application for a writ of certiorari.

From this fact, petitioner concludes that the Supreme Court,

> "thereby approved the conclusion reached by the Appellate Court and the denial of the said writ was, in effect, an affirmance of the judgment of the Appellate Court",

It may be true that the latter clause of petitioner's conclusion, *i. e.*, that such denial was an affirmance of the *judgment*, but it is not true that it can be considered as an adoption of the reasoning and expressions in the opinion of the Appellate Court, or a construction of the Uniform Negotiable Instruments Act by the highest court in the state.

Under Section 121 of the Illinois Practice Act in force at the time, the denial of a certiorari renders the *judgment* of the Appellate Court final, but this enactment does not have the effect of rendering the *opinion* of the Appellate Court final or *stare decisis* in any cause other than that in which the opinion was filed (Cahill's Ill. Rev. Stat. 1933, Appendix, page LXXVI, par. 120).

Non constat but that the Supreme Court may disagree wholly with the reasoning of the Appellate Court's *opinion*, and still decline to review the *judgment*.

It must be borne in mind that the statutory certiorari was not a matter of right, even if a showing was made, but a matter of grace, resting in the uncontrolled and non-reviewable discretion of the Supreme Court. In granting a certiorari, or in denying it, the Supreme Court was governed by no rules of law, and was required to give no reason for its action.

If, upon general principles, or what are sometimes called "the fireside equities", the Supreme Court believed the *judgment* of the Appellate Court was right, it could and

as every lawyer knows, often did deny certiorari when it was manifest that the reasons given by the Appellate Court in its opinion were absolutely wrong and without legal foundation.

> "The denial of the writ of certiorari therefore, meant nothing more than that we approved the conclusion of the Appellate Court that the State's Attorney should have signed and presented the petition. *It did not mean that we approved the reasons set out in the opinion of that Court and its determination of the merits of the case, and the rights of the parties* to be affected by the information when filed. (*Soden* v. *Claney*, 269 Ill. 98.)"
>
> *People ex rel.* v. *Grant*, 283 Ill. 391 at 397.

In this last cited case when it was in the Appellate Court (*People ex rel.* v. *Grant*, 1st Dist., 208 Ill. App. 235), that Court devoted very earnest attention to the contention that a denial by the Supreme Court of a certiorari is tantamount to an expression of opinion by the Supreme Court in accordance with the views expressed in the opinion of the Appellate Court.

The contention was disapproved, the majority of the Court saying (208 Ill. App. at 239, *et seq.*):

> "On the argument it was further suggested that as an application had been made to the Supreme Court in that case for a writ of certiorari and denied, the court, by such action, passed upon the merits of the controversy, and thus declared itself to be in harmony with the conclusion reached by the Appellate Court. This contention, in our judgment, involves an entire misconception of the purpose and effect of the statutory provisions in regard to writs of certiorari. Those provisions are substantially identical with a section of the

United States statute providing for the issuance of writs of certiorari to the Circuit Court of Appeals.

* * *

"It seems a conclusive answer to the relator's contention to say that, during the 26 years that the United States certiorari act has been in force, there does not appear to be a case in which counsel have suggested that the Supreme Court, by denying the writ of certiorari, stamped the conclusions of the Court of Appeals with its approval, and impliedly made a declaration in regard to what was the law. The language of the statute does not require our Supreme Court to issue a writ of certiorari in any case, but merely provides that it shall be competent for it to do so; nor does it require the court to pass upon the merits of the controversy presented, but leaves that to the discretion of the court, to be exercised in every case. So, in the case cited here, the question considered upon the application for the writ was not necessarily the one as to the correctness of the conclusions of this court. The Supreme Court first had presented to it the question of whether there was anything in the circumstances of the case which made it expedient for it to pass upon the merits of the controversy and to declare the law. Obviously it was competent for the Supreme Court to go into the merits of the contentions made in the petition, but it was equally competent for it to say that as, under the decision of the Appellate Court, the questions involved would again be presented in a *quo warranto* proceeding in which all the parties in interest would be before the court, it would be better to pass upon them in that case, in which a binding adjudication of the rights of all the parties could be made. Any inference, therefore, as to the opinion

of the Supreme Court in regard to the correctness of the conclusion reached by the Appellate Court must necessarily rest upon speculation and conjecture. The function of finally declaring the law of the State rests with its Supreme Court, and is accomplished by means of its opinions, in which it speaks through its justices. The only safe rule would, therefore, appear to be that its conclusions in regard to the law are to be found in its reported opinions, and not deduced inferentially from its action in denying writs of certiorari.

* * *

"The effect of a denial of a writ of certiorari, though conclusive, is purely negative. By its action, the Supreme Court does not review the judgment of the Appellate Court, but declines to do so. This does not make the judgment of the Appellate Court final, but it leaves its finality undisturbed. For these reasons we are constrained to hold that the action of the Supreme Court in denying the State's Attorney's petition for a writ of certiorari in the case cited does not constitute an authoritative declaration in regard to the questions of law involved, and that so far as any action by the Supreme Court is concerned, these questions are still open. It, therefore, devolves upon us to consider the merits of the points presented."

The Supreme Court of the United States, in *Minn. St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410 at 412; 73 L. ed. 766 at 768, construes Sec. 121 of the Illinois Practice Act (the Certiorari section) with reference to the effect of a denial of certiorari, and says:

"While such denial is not an approval of the reasons on which the Appellate Court rests its judgment, it is an approval of the conclusion reached by it."

We submit that "conclusion" is used by the Court in the sense of "judgment", not reasoning or statutory construction.

The certiorari provisions of Section 121 of the Illinois Practice Act of 1907 are clearly modeled upon the certiorari provisions of the Federal Circuit Court of Appeals Act (Judicial Code, Sec. 347, which is the old Section 240 as amended).

There is a discretionary power in both the Federal and the Illinois Supreme Courts to bring up by certiorari for review, the judgments of the intermediate court, but it has never been considered by the Federal Courts that a denial by the United States Supreme Court of a certiorari to review a judgment of the Circuit Court of Appeals was an affirmance of the views of that Court, or an adoption or sanction of such views.

In *Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251 at 258, the Court says:

> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ" (certiorari) "is in no case equivalent to an affirmance of the decree that is sought to be reviewed."

Again, in *U. S.* v. *Carver*, 260 U. S. 482 at 490; 67 L. ed. 463, Mr. Justice Holmes said:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case *as the bar has been told many times.* Therefore, it is unnecessary to consider whether the libellants' argument is supported by the decisions to which they refer" (*i. e.*, decisions of Circuit Court of Appeals in which certiorari had been denied). *Cited in Atl. Coast Line R. R. Co.* v. *Powe*, 283 U. S. 401 at 404.

In *Hudson v. Maryland Casualty Co.* (C. C. A., 8th Cir. 1927) 22 Fed. 2nd 791, the Circuit Court of Appeals had occasion to consider the effect of a decision of an intermediate appellate court of Missouri as to construction of a Missouri statute. In denying the contention that the Federal Courts were bound by a construction of a Missouri statute placed upon it by the intermediate appellate court (which seems to be in all respects equivalent to the Appellate Courts of Illinois), Stone, Circuit Judge, said:

> "It is true that for some purposes and in some senses these Courts of Appeals are courts of final resort. There is no *positive right* to a review of their decisions by the Supreme Court of the state. In that sense their decisions are final and in that sense the Supreme Court of the state has referred to them as courts of 'last resort'.
>
> • • •
>
> "But the rule now invoked is one of federal procedure and its meaning must be sought in its purpose. That purpose is for federal courts to apply the state statute as that statute has been authoritatively declared by the highest court of the state. Until the court of last resort, as personified by the highest state court which can speak upon the subject, has spoken, there can be no such finality of decision as required by the rule. The highest court of Missouri is the Supreme Court. Its decisions are controlling upon the three Courts of Appeals of that state (Const. Mo., art. 6 (Amendment of 1884), Sec. 6) and decisions of such Courts of Appeals have not the force of *stare decisis with the Supreme Court.*
>
> • • •
>
> "Each of these Courts of Appeals has a separate geographical jurisdiction and a decision by one such

court is binding only within its jurisdiction. Where these courts disagree, there is a divergence of authority even within the state and such differences have occurred. No one nor all of them can *finally* announce the law of the state, only the Supreme Court of the state can do that. This court has great respect for the opinions of the learned judges of these Courts of Appeals and will always give careful attention to the reasoning in their opinions; but persuasive force of reasoning and binding authority of decisions are different matters based upon different considerations. The harmony of decision desirable and sought by the federal rule of construction is harmony with the law as declared for the entire state by the highest state court which could determine the matter. In our judgment, the Courts of Appeals of the State of Missouri are not such courts".

It therefore appears certain that the mere assumption, without authority to support it, indulged in by counsel for petitioner on page 12 of the petition, that the opinion of the Appellate Court, in the *Northwestern Nat. Bank case* was binding on the District Court and the Circuit Court of Appeals cannot prevail, and the Circuit Court of Appeals was correct in holding that:

"It is, however, only the decisions of the highest courts of the states that are binding upon us. *Hudson* v. *Maryland Casualty Co.*, 22 F. (2d) 791 (C. C. A. 8).

The fact that the defeated party sought to review the decision in the *Northwestern Nat. Bank* Case, *supra*, and the Supreme Court of Illinois denied its application for a certiorari makes that decision no more authoritative. *People* v. *Grant*, 283 Ill. 391, 397, 119 N. E. 344; *Minneapolis, St. P. & S. S. M. Ry. Co.*

v. *Rock*, 279 U. S. 410, 49 S. Ct. 363, 73 L. Ed. 766; *United States* v. *Carver*, 260 U. S. 482, 43 S. Ct. 181, 67 L. Ed. 361. The rule announced in said *Northwestern Nat. Bank* Case, *supra*, has not been approved or passed upon, by the Illinois Supreme Court.

It becomes our duty, therefore, to examine the question in the light of all of the decisions of state and Federal courts and follow the United States Supreme Court decisions, if there are any in point; otherwise to announce that decision which in our opinion is in accord with the weight of reason and authority."

The fact that review of the decision of the intermediate court by the highest court of the state has been denied, thus making the *judgment* of the intermediate court final, does not have the effect of a decision of the highest court of the state so that the Federal Courts will follow it.

Cont. Secur. Co. v. *Interborough R. T. Co.*, (Circ. Ct. So. Dist. N. Y. 1908) 165 Fed. 945 at 959.

Federal Courts, upon all questions of commercial law, exercise their own independent judgment, regardless of state rules, interpretations and decisio

Swift v. Tyson, 16 Pat. 1 at 19.

Salem Tr. Co. v. Manuf. Fin. Corp. (1924), 264 U. S. 182 at 191, 192.

Presidio County v. Noel-Young Bond Co., 212 U. S. 58 at 73.

Sears v. *Greater N. Y. Devel. Co.*, (C. C. A. 1st Circ. 1931) 51 Fed. 2nd 46 at 49.

Independent School Dist. v. *Rew*, (C. C. A. 8th Circ.) 111 Fed. 1 at 11.

25 Corpus Juris, page 846, Section 185.

27 Ruling Case Law, page 52, Section 58.

This principal is applied to construction of the Uniform Negotiable Instruments Act.

Peterson v. *Metro. Life Ins. Co.*, (Dist. Ct. So. Dist. Ia. 1926) 19 Fed. 2nd 74 at 84.

Jockmus v. *Claussen & Knight, Inc.*, (Dist. Ct. So. Dist. Fla. 1930) 47 Fed. 2nd 766 at 767.

Cases relied upon by petitioner distinguished and criticized.

The principal reliance of petitioner in the District Court was placed upon the Illinois Appellate Court case, *N. W. Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22.

We have sufficiently pointed out in previous portions of this argument the reasons why that case will not be followed in this court.

Aside from that case, petitioner relied confidently upon *Childs* v. *Harris T. & S. Bank*, 27 Fed. (2nd) 633, decided in the Circuit Court of Appeals for the Seventh Circuit on June 27, 1928.

An analysis of that case will disclose that the opinion of *Carpenter, J.*, does not support the contention of petitioner or militate in any wise against the positions taken by respondent.

In that case, the facts were wholly diverse from the state of facts in the case now before the Court, and the crucial legal proposition in that case, upon which the decision turned, is wholly absent from the instant case.

The salient facts in the *Childs* case, divested of unimportant detail are as follows:

An employee of Childs, on September 6, 1921, stole Liberty Bonds of the par value of $25,000 from Harris without the knowledge of Childs. The next day Childs

received from Harris a notice of the theft, giving the numbers and denominations of the bonds.

The thief kept the bonds in his possession until June, 1922, and on June 10, 1922, the thief substituted for bonds *owned by Childs*, which were being shipped to New York, *the stolen* bonds, keeping the bonds which were the property of Childs.

At the time of this substitution, Childs had had repeated notices from Harris, giving the numbers and denominations of the stolen bonds.

In sending out the package of bonds to New York, a true list of numbers and denominations of the shipment of bonds which were the actual property of Childs, was included, but when the bonds got to New York, $25,000 of stolen bonds had been substituted by the thief for an equal lot of the bonds owned by Childs. Upon arrival of the shipment in New York, Childs' New York office did not check the bonds received with the enclosed list. If they had so done, the substitution of the stolen bonds, of the theft of which Childs had undisputed knowledge, would have been disclosed.

In the *Childs* case, the firm of C. F. Childs & Company did not get the bonds in the usual course of trade and did not give value for them. The Court disposes of this contention adversely to C. F. Childs & Company, and holds:

1. That there was no negotiation of the bonds to Childs.

2. That Childs gave no value for them, and

3. That if the substitution of the stolen bonds by the thief could be treated as a negotiation, Childs in taking such a position is bound by the guilty knowledge of the thief, its own agent.

There can be no question that respondent, White-Phillips Co., Inc., took the Illinois highway bonds in the usual and ordinary course of business and for value. The evidence establishes these two elements beyond peradventure, and thus the ratio *decidendi* and crucial point in the *Childs* case is wholly absent in the instant case as shown by the following excerpt from the opinion (p. 635):

> "No citation of authorities is needed on the proposition that, if Childs knew of its thief employe's part in the drama, it was bound to make full recompense to Harris. Childs' claim as holder for value under the Illinois Negotiable Instruments Law is not sound, because there was no negotiating between Childs and its thief employe, and because, if Childs chooses to treat it as a *negotiation* (*ex parte* to say the least), it must adopt the transaction *in toto*, charged with the guilty knowledge of the wrongdoer, its agent and servant".

CONCLUSION.

Manifestly, from the record, there is here presented an attempt to found a solitary exception in a single state to an universally accepted doctrine of the law of commercial paper, upon the decision of an inferior court of Illinois, concerning which the highest court of a respectable jurisdiction has said "As far as we have been able to determine, this case stands alone" (*Merch. Nat. Bank* v. *Detroit Trust Co.*, 258 Mich. 526), which decision is in conflict with a later holding of another co-ordinate branch of the same inferior court (*Nat. Bank* v. *Uptown State Bank*, 273 Ill. App. 401 at 405).

We submit that it is not upon such tenuous grounds that this court should overset a time honored, established and recognized rule of the law merchant, bottomed upon principle and essential to the free and liquid flow of negotiable paper.

Wherefore, respondent respectfully prays that the application for the writ of certiorari be denied.

All of which is respectfully submitted.

WILLIAM L. PATTON,
Attorney for Respondent.

HAROLD A. SMITH and
WINSTON, STRAWN & SHAW,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1935

No. 29

RICHEY V. GRAHAM,
Petitioner,

vs.

THE WHITE-PHILLIPS COMPANY, INC.,
Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT.

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Petition for Certiorari Filed April 23, 1935.
Certiorari Granted May 27, 1935.

CHICAGO LAW PRINTING CO., 111 W. WACKER DRIVE (COR. WASHINGTON ST.) TEL. FRANKLIN 0021

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ERRATA IN BRIEF OF RESPONDENT.

---

(1) On page 17 in fourth line of third paragraph "appellee" should read "petitioner".

(2) On Page 24 in second and third lines, "one cause" should read "due course".

(3) On Page 59 in third line of quotation, "found" should read "bound".

WILLIAM L. PATTON,
Counsel for Respondent.

HAROLD A. SMITH and
WINSTON, STRAWN & SHAW,
Of Counsel.

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IN THE

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OCTOBER TERM, A. D. 1935

No. 29

RICHEY V. GRAHAM,

Petitioner,

VS.

THE WHITE-PHILLIPS COMPANY, INC.,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT.

STATEMENT.

The statement of the case by petitioner, supplemented by the statement made by the Circuit Court of Appeals (Record pp. 144-146) seems to respondent sufficient. The facts of the case are fully and correctly stated by the Trial Court in the findings of fact (Trans. Rec. pages 105-108) down to Finding No. 10, which is not a finding of fact but conclusion of law.

The Position of Respondent.

A.

Respondent insists that upon the record here, the evidence was sufficient, as held by the Circuit Court of Appeals, to establish its right to the bonds as holder in due course, for value, in good faith, without evidence of any such notice of any defect in the title of Connolly at the time of the purchase, as, in the Federal Courts would be sufficient to impute bad faith or impair its status as a bona fide holder, and asserts that it carried the burden of proof of showing that it had not *actual knowledge* of any defect in Connolly's title, or *knowledge* of such facts that its action in taking them amounted to bad faith, and relies upon the law of commercial paper as laid down and administered in all courts save an intermediate court of Illinois, upon the question of the character of proof of knowledge which will impute bad faith to the purchaser of negotiable securities.

B.

Respondent insists that the decision and opinion of the Appellate Court of the First District of Illinois, not the highest court of that State, is not a construction of the Uniform Negotiable Instrument Act of Illinois, but is a mere decision upon an evidentiary matter.

C.

Respondent insists that this Court, even if it can be held that the decision of said intermediate court is a construction of the Illinois Statute, is not bound to follow it, because the denial of certiorari by the Supreme Court of Illinois (the highest Court of the State), does not make the decision of said intermediate court, the decision of the highest court of the State.

SUMMARY OF ARGUMENT AND AUTHORITIES IN SUPPORT THEREOF.

I.

The Uniform Negotiable Instruments Act, (and particularly Secs. 52, 56 and 59 of Art. IV), is merely declaratory of the common law.

Peterson v. *Metro. Life Ins. Co.* (Dist. Ct. So. Dist. Ia. 1926) 19 Fed. 2nd, 74 at 85.

Gerseta Corp. v. *W.-C. Silk Co.* (C. C. A. 2nd Circ. 1924) 3 Fed. 2nd 236.

Commercial Nat. Bank v. *Canal-Louisiana B. & Tr. Co.*, 239 U. S. 520 at 528.

City of Adrian v. *Whitney Cent. & Nat. Bank* (1914) 180 Mich. 171; 146 N. W. 654.

City Bank v. *Bank of Republic*, (1921) 300 Ill. 103 at 106.

Link v. *Jackson*, (1911) 158 Mo. App. 63; 139 S. W. 588 at 593.

Unaka Nat. Bank v. *Butler*, (1904) 113 Tenn. 574; 83 S. W. 655 at 657.

Campbell v. *Fourth Nat. Bank*, (1910) 137 Ky. 555; 126 S. W. 114 at 116.

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Drouineau v. *Bank*, 244 Ill. App. 251.

Chi. Auto Sales Co. v. *Peters*, 221 Ill. App. 363 at 367.

II.

Under the common law,—the Law Merchant,—adopted into the Uniform Negotiable Instruments Act in Section 56, (For statute, see Petitioner's Brief, pages 36-37), it was, and is present, actual knowledge of a defect in the title of the transferor, not past constructive notice of some such defect, which will render the act of the transferee in taking the paper bad faith to the extent of impairing his title.

(A) Uniform Negotiable Instruments Act, Section 56. Cahill's Illinois Revised Stat., 1933, page 1920, Paragraph 76.

Goodman v. *Symonds*, 20 How. 343.

Vermilye & Co. v. *Adams Exp. Co.*, 21 Wall. 138.

Merch. Nat. Bank v. *Detroit Tr. Co.* (1932) 258 Mich. 526; 242 N. W. 739.

Seybel v. *Nat. Cur. Bank*, 54 N. Y. 288.

Heney v. *Sutro*, (1915) 28 Cal. App. 702; 153 Pac. 972.

Gerseta Corp. v. *W. C. Silk Co.*, (C. C. A. 2nd Circ. 1924) 3 Fed. 2nd 236.

Link v. *Jackson*, (1911) 158 Mo. App. 63; 139 S. W. 588 at 593.

Lord v. *Wilkinson*, (N. Y.) 56 Barb. 593.

Beltzhoover v. *Blackstock*, (Pa.) 3 Watts 20.

Eng. Amer. L. & T. Co. v. *Hiers*, (Ga.) 38 S. E. 103.

Halliday v. *Elberton L. & S. Bank*, (Ga.) 128 S. E. 131.

Wildsmith v. *Tracy*, 80 Ala. 258.

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Clark v. *Ricker*, 14 N. H. 44.

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Unaka Nat. Bank v. *Butler*, (1904) 113 Tenn. 574; 83 S. W. 655 at 656.

Peterson v. *Emery*, (1910) 154 Ill. App. 294, at 298.

Knolt v. *Cartwright*, (1916) 202 Ill. App. 502, 506.

Pollard v. *Toben*, 211 Wisc. 405, followed in *Marine Nat. Exch. Bank* v. *Kalt-Zimmers Mfg. Co.*, (1934) ..... U. S. .....; 79 L. ed. 208 at 210-11.

Mickey Bros. v. *Lonsdale Mfg. Co.*, (Tenn.) 257 S. W. 403; 149 Tenn. 1.

(B) This is and ever since 1836 has been the rule in the British courts.

Raphael v. *Bank of England* (1855), 17 C. B. 161;

Venables v. *Baring Bros. & Co.* (1892), 3 Ch. Div. 527, at 542.

London Joint Stock Bank v. *Simmons*, (1892) App. Cas. at pp. 219, 221 and 227.

(C) This Court, in 1874 held that this was "the well settled law of the case".

Vermilye & Co. v. *Adams Exp. Co.*, 21 Wall. 138.

(D) The original owner of stolen bonds, by circularizing dealers in negotiable securities of the fact of the theft, cannot impose an obligation upon such dealers to read, keep in mind or preserve or search his records for such notices previous to buying bonds offered.

The rule was established in *Vermilye & Co.* v. *Adams Exp. Co.*, 21 Wall. 138 at 146, as follows:

> "By the well settled law of the case, they" (dealers in negotiable securities) "may purchase such paper before due without cumbering their minds or their offices with the memoranda of such notices."
>
> *Raphael* v. *Bank of England*, 17 C. B. 161; 84 E. C. L. 161; 33 Eng. L. & Eq. 276.

A mere negligent mode of dealing with such circulars, resulting in ignoring the information as to stolen paper, is no evidence of *mala fides*, and actual *mala fides* must appear before the title of the purchaser will be affected.

> *Raphael* v. *Bank of England*, (1855) 17 C. B. 161; 139 Eng. Rep. 1030.
>
> Lord Field in *London Joint Stock Bank* v. *Simmons*, (1892) App. Cas. at 227.
>
> Lord Kekewich in *Venables* v. *Baring Bros. & Co.*, (1892) 3 Ch. Div. 527 at 542.

Save for the Illinois Appellate Court case (*N. W. Nat. Bank* v. *Madison & K. State Bank*, 242 Ill. App. 22), the *Vermilye case* has been approved and adopted in every instance where the question has arisen.

Seybel v. *Nat. Curr. Bank*, 54 N. Y. 288 at 302.

Heney v. *Sutro & Co.*, (Calif. 1915) 28 Calif. App. 702; 153 Pac. 972 at 974.

Merch. Nat. Bank v. *Detroit Trust Co.*, (1932) 258 Mich. 526; 242 N. W. 739 at 743.

Beltzhoover v. *Blackstock*, (Pa.) 3 Watts 20.

(E) The Federal rule as to proof of title to negotiable paper was laid down in 1864 and has prevailed ever since without modification.

That rule was thus summarized in *Murray* v. *Lardner*, 2 Wall. 110, at page 121.

> "The possession of such paper carries the title with it to the holder:—'The possession and title are one and inseparable'.
>
> The party who takes it before due for a valuable consideration, without *knowledge* of any defect of title, and in good faith, holds it by a title valid against all the world.
>
> Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. *That result can be produced only by bad faith on his part.*
>
> *The burden of proof lies on the person who assails the right claimed by the party in possession.*

Such is the settled law of this court, and we feel no disposition to depart from it".

Long Island L. & T. Co. v. *Columbus, C. & I. C. Ry. Co.*, 65 F. 455 at 459.

Hotchkiss v. *National Banks*, 21 Wall. 354.

Pridgen v. *Baugh & Sons Co.*, 30 Fed. 2nd, 353 at 355.

III.

While proof of defect in title of transferor casts the burden of showing good faith on the transferee, this burden is carried when the transferee shows that no person who was concerned in the purchase had actual knowledge at the time of the transfer of any defect in the title.

Hotchkiss v. *Nat. Shoe & L. Bank*, 21 Wall. 354.

Crittenden v. *Widrewitz* (Circ. Ct. App. 2nd Circ. 1921) 272 Fed. 871.

Pridgen v. *Baugh Sons & Co.* (Circ. Ct. App. 4th Circ. 1929) 30 Fed. 2nd 353 at 356.

Des Moines Sav. Bank v. *Arthur*, (1913) 163 Ia. 205; 143 N. W. 556 at 560.

First Nat. Bank v. *Dutton*, (1925) 199 Ia. 468; 202 N. W. 228 at 229.

Perry Sav. Bank v. *Fitzgerald*, 167 Ia. 446; 149 N. W. 497.

Robertson v. *U. S. Live Stock Co.*, 164 Ia. 230 at 234.

Johnson Co. Sav. Bank v. *Walker*, (1906) 79 Conn. 348; 65 Atl. 133.

Nat. Bank v. *Uptown State Bank*, (1934) 273 Ill. App. 401 at 404, 405.

In the very late case of *Merch. Nat. Bank* v. *Detroit Trust Co.*, (1932) 258 Mich. 526; 242 N. W. 739 at 743, the Court says:

> "In the instant case, the notice was received by the mailing clerk, but the three officers of the trust company deny that they received it or were made acquainted with its contents. We know of no reason why we should doubt their testimony. The record shows that they acted in good faith."

A jury cannot disregard the unimpeached testimony of the officer or agent who made the purchase, that he had no knowledge of any defect in the title of the transferor, and such testimony will compel the direction of a verdict in favor of the transferee.

Jerke v. *Delmont State Bank*, (1929) 54 So. Dak. 446; 223 N. W. 585 at 589.

Uncontradicted testimony that a bank acquired stolen paper, before maturity, for value and without notice of any infirmity of title authorized a directed verdict for the bank.

Emp. Liability Assur. Corp. v. *Greenfield*, (Pa. 1934) 175 Atl. 403.

IV.

In the absence of a construction of a State statute, dealing with the Law Merchant, by the highest court of the State;—

(A) Federal Courts, upon all questions of commercial law, exercise their own independent judgment, regardless of state rules, interpretations and decisions.

Swift v. *Tyson*, 16 Pet. 1 at 19.

Salem Tr. Co. v. *Manuf. Fin. Corp.* (1924), 264 U. S. 182 at 191, 192.

Presidio County v. *Noel-Young Bond Co.*, 212 U. S. 58 at 73.

Citizens Nat. Bank v. *Waugh*, (C. C. A. 4th Circ. June 3, 1935) 78 Fed. 2nd 325—Adv. Sheets Sup. 16, 1935.

Sears v. *Greater N. Y. Devel. Co.*, (C. C. A. 1st Circ. 1931) 51 Fed. 2nd 46 at 49.

Independent School Dist. v. *Rew*, (C. C. A. 8th Circ.) 111 Fed. 1 at 11.

25 Corpus Juris page 846, Section 185.

27 Ruling Case Law page 52, Section 58.

(B) This principle is applied to evidentiary questions of the Uniform Negotiable Instruments Act.

Peterson v. *Metro. Life Ins. Co.*, (Dist. Ct. So. Dist. Ia. 1926) 19 Fed. 2nd 74 at 84.

Jockmus v. *Claussen & Knight, Inc.*, (Dist. Ct. So. Dist. Fla. 1930) 47 Fed. 2nd 766 at 767.

(C) In the absence of an authoritative construction of a state negotiable instrument act by the highest court in the state, the duty of a Federal Court is to determine the question according to the accepted canons and in the light of the decisions of the courts of other states with respect to a like question of commercial law.

Burns Mortgage Co. v. *Fried* (1934) 292 U. S. 487; 78 L. ed. 939.

Marine Nat. Exch. Bank v. *Kalt-Zimmers Mfg. Co.* (1934) ..... U. S. .....; 79 L. ed. 208.

V.

The decision of the Appellate Court, First District, Second Division, State of Illinois, in Northwestern Nat. Bank v. Madison & Kedzie State Bank, 242 Ill. App. 22, will not be followed in the Federal Courts.

(A) Because the Appellate Court of the State of Illinois is not the highest court in the state. It is an "inferior appellate court" (Constitution of Illinois of 1870. Article VI, Section 11). Its opinions "shall not be of binding authority in any cause or proceeding, other than in that in which they may be filed." Cahill's Illinois Revised Statutes 1933, Chapter 37; Paragraph 49, page 918.

Hall v. *Main*, (Dist. Ct. East. Dist. Ill. 1929) 34 Fed. 2nd 528 at 530.

Corpus Christi Gas Co. v. *Corpus Christi*, (Dist. Court So. Dist. Tex. 1930) 36 Fed 2nd 972 at 973.

Wright v. *N. Y. Underwriters Ins. Co.*, 1 Fed. Supp. 663.

In re Gary, 281 Fed. 218.

Anglo-Am. etc. v. *Lombard*, 132 Fed. 721 at 741.

Fed. Lend Co. v. *Swyers*, 161 Fed. 687 at 691.

Trapp v. *Met. Life Ins. Co.*, 70 Fed. 2nd 976 at 979.

The fact that review of the decision of the intermediate court by the highest court of the state has been denied, thus making the *judgment* of the intermediate court final, does not have the effect of a decision of the highest court of the state so that the Federal Courts will follow it.

Cont. Secur. Co. v. *Interborough R. T. Co.*, (Circ. Ct. So. Dist. N. Y. 1908) 165 Fed. 945 at 959.

The denial of the writ of certiorari by the Illinois Supreme Court, does not have the effect of a construction of the State Statute by that Court.

It is not an affirmance of the views expressed in the opinion of the Appellate Court.

People v. *Grant*, 283 Ill. 391 at 397.

Minn. St. P. & S. S. M. Ry. Co. v. *Rack*, 279 U. S. 410 at 412; 73 L. ed. 766 at 768.

Hamilton Shoe Co. v. *Wolf Bros.*, 240 U. S. 251 at 258.

U. S. v. *Carver*, 260 U. S. 482 at 490; 67 L. ed. 463.

Hudson v. *Maryland Casualty Co.*, (C. C. A. 8th Circ. 1927) 22 Fed. 2nd 791.

"Nor can we assume approval" (of the decision of the intermediate court) "from the fact that a petition for certiorari was denied on February 13, 1934," by the United States Supreme Court.

In re F. & W. Grand 5-10-25 Cent Stores, (C. C. A. 2nd Circ. 1934) 69 Fed. 2nd 807 at 808.

(B) Because the opinion in that case is not (even if it can be considered as a decision by the highest court of the state, because of the denial of the certiorari), a construction of the Negotiable Instrument Act. It is merely a finding that certain evidentiary elements, present in that case, as a matter of fact, constituted notice.

The construction of a statute arises only where there is ambiguity or doubt or uncertainty in the language of the statute.

Michigan v. *Michigan Trust Co.*, 286 U. S. 334, 343.

"The phrase, 'construction of a statute,' as used in the new act, means to interpret, to elucidate and to define and declare a meaning of that which is obscure and uncertain and can have no application to a statute in which there is nothing doubtful or ambiguous in its terms."

Terre Haute & L. R. Co. v. *Erdel,* 158 Ind. 344; S. C. 62 N. E. 706 at 707.

25 R. C. L. 957-958.

Clayton v. *Colorado & S. R.,* 51 Fed. 2nd 417.

Mere application of a given state of facts to unquestioned and unambiguous provisions of a statute is not a construction of the statute, it is a fact finding.

Gulf Paving Co. v. *Atlanta,* 149 Ga. 114.

Stewart Dry Goods Co. v. *Lewis,* 7 Fed. Supp. 438 at 445.

Williams v. *Drake,* (Dist. Ct. E. Dist. Ill.) 9 Fed. Supp. 672.

Pana v. *Bowler,* 107 U. S. 529, 540.

The finding in the Illinois Appellate Court case relied upon by petitioner, that circularization conveyed "notice," is not a construction of the statute, nor is it an inference or holding of law, it is but a finding of fact.

"Likewise, whether one has notice of a certain fact is a question of fact and not of law (*Cramer* v. *Burkhalter,* 207 Ill. 34; *City of Decatur* v. *Besten,* 169 *id.* 340.) We are of the opinion, therefore, that the finding that the plaintiff in error bank had notice or was put upon notice of the fact of Callum's want of authority to issue a check of Paine, Webber & Co. to pay his personal indebtedness was the finding of an ultimate fact."

Paine v. *Sheridan Trust & Sav. Bank,* (Illinois Supreme Court, 1930) 342 Ill. 342 at 348.

(C) Because the Appellate Court case is contrary to the Federal rule as to what evidentiary facts constitute notice, and to the weight of British and American authority. As said by the Michigan Supreme Court, "This case stands alone".

Merch. Nat. Bank v. *Detroit Trust Co.*, (1932) 258 Mich. 526; 242 N. W. 739 at 743.

(D) Because the First Division of the Appellate Court, First District of Illinois, in 1934 held contra to the earlier case relied upon by Petitioner, from the Second Division of the same court.

Nat. Bank v. *Uptown State Bank*, 273 Ill. App. 401 at 405.

DISCUSSION OF THE PROPOSITIONS.

While desiring to shun the common error of counsel in magnifying the importance of the questions presented in their own causes, we feel that we are justified in the assertion that in the instant case there are questions of much more general and far reaching importance to the commercial world than in the majority of cases which come into the courts for consideration.

The necessity for universality throughout the entire country in the holdings of the Federal Courts upon important doctrines concerning dealings in commercial paper; the paramount function of the Federal Courts over State Courts in laying down these doctrines; the freedom of transfer from hand to hand of negotiable paper; the rights and duties of those dealing in such paper which may have been the subject of theft and the status of the transferee of paper which has been stolen from a holder, are all of vital importance to the unrestricted flow of such paper in the channels of trade, and to those bankers and brokers whose business it is to deal in such paper and thus keep liquid the credits both of the private and public corporation as well as of the individual business man.

Dealing in and ownership of such securities cannot be confined within state boundaries—negotiable bonds must have a nation-wide status as to all the incidents of transfer, so that those dealing in them may have an universal yardstick by which to measure the incidents of ownership and transfer, and the citizen of California who deals in such securities must not, when rightfully invoking the jurisdiction of a Federal Court, be required to subject his rights

to the varying doctrines of the Courts of a dozen or more other states as to quantum of proof which will affect a purchaser with "notice" or "actual knowledge" of infirmity of title, when a question arises concerning the validity of his title to his property, but, of necessity must have the right to resort to the Federal Courts, and to find there holdings, doctrine and established legal principles which are uniform wherever his right may be drawn in question in a controversy in which the Federal Courts have jurisdiction.

The principle has been well expressed by Sanborn J., in the Circuit Court of Appeals for the Eighth Circuit in *Independent School Dist.* v. *Rew*, 111 Fed. 1, at page 11:

> "It is not only the privilege, but the duty, of Federal Courts, imposed upon them by the constitution and statutes of the United States, to consider for themselves, and to form their independent opinions and decisions upon, questions of commercial or general law presented in cases in which they have jurisdiction, and it is a duty which they cannot justly renounce or disregard. Jurisdiction of such cases was conferred upon them for the express purpose of securing their independent opinions upon the questions arising in the litigation remitted to them.
>
> And a citizen of the United States who has the right to prosecute his suit in the national courts has also the right to the opinions and decisions of those courts upon every crucial question of general or commercial law or of right under the constitution or statutes of the nation which he presents."

See Respondent's Brief, p. 8, Sec. IV, *supra.*

Citizens Nat. Bank v. *Waugh*, (C. C. A. 4th Circ. 1935) 78 Fed. 2nd 325—Adv. Sheets.

The "crucial question" in this case is the evidence which is necessary to sustain the title of the transferee of a negotiable instrument, and the determination of this question involves the general law of commercial paper, the incidents of its transfer, the question of sufficiency of proof of bona fides of the transferee and what character of evidence of notice of an infirmity of title of the transferor will impair the title of the transferee.

It is true that Petitioner argues that the "crucial question" is a construction of the Negotiable Instruments Act of Illinois, and that that question is foreclosed here by a construction of that Act by an intermediate Appellate Court of Illinois, to which a certiorari was denied by the highest court of Illinois, but we submit, with deference, that we will demonstrate (1) that there was no construction of the Act, even by the intermediate court, and (2) that though it be thought that there was such a construction by that court, the denial of the certiorari by the highest court, did not make the decision of the intermediate court a construction by the highest court in the sense that this court is bound thereby.

All these questions which we class as crucial, are of general or commercial law, and as to these questions this Court will exercise its independent judgment, unless the contention of appellee shall prevail that the holding of the Second Division of the Appellate Court of the First District of the State of Illinois, as to the quantum of proof necessary to establish good faith under the Uniform Negotiable Instruments Law of the State of Illinois in *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22, is of binding force upon this Court.

That such holding is not of even persuasive effect seems to be true for very well established reasons.

In the first place, it is only the decisions of the highest court of a state upon some question of construction of the statutes of that state which will be followed in the Federal Courts, and the Appellate Court of Illinois is not the highest court but merely an intermediate court, whose opinions, by the statute creating it "shall not be binding authority in any cause or proceeding, other than in that in which they may be filed." (Respondent's Brief of Law, *supra*, p. 10, Sec. V.)

In the second place, it is only a holding upon the construction of a state statute that the decision of the highest court of the state is binding upon the Federal Courts, and they will not be deemed bound by the decisions of state courts where no question of construction of a statute is passed upon but merely the evidentiary question of what facts proven will affect a purchaser of negotiable instruments with notice.

And thirdly, the Appellate Court, First District, First Division, has recently held the absolute opposite to the holding in the Second Division (Respondent's Brief, *supra*, p. 13.)

The question then arises as to whether the applicable sections of the Illinois Negotiable Instruments Law do not simply prescribe the elements which go to make up a holder in due cause, without laying down any rule as to the evidentiary facts which will be sufficient as a general common law principle, to establish the existence of those elements, and this first involves a consideration of what was the general law merchant with respect to the proof which would establish who were bona fide purchasers of negotiable paper before due, at and prior to the time of the adoption of the Uniform Negotiable Instruments Act by Illinois in 1907.

There can be little doubt, after a study of Federal as well as State decisions, that the doctrine approved and applied by the Supreme Court of the United States in 1864, in the case of *Murray* v. *Lardner*, 2 Wall. 110 at 121, settled the Federal law upon the lines laid down in 1842 in *Swift* v. *Tyson*, 16 Pet. 1, and expanded in 1857 in *Goodman* v. *Simonds*, 20 How. 343, and was the general law merchant of practically the entire country at the time of the adoption in Illinois of the Uniform Act.

That rule was summarized in *Murray* v. *Lardner*, 2 Wall. 110, at page 121 in the language of our quotation from the opinion of Mr. Justice *Swayne* found at Sec. II, E. of the Brief.

The elements and conclusive indicia of title as declared in that case are,

1. Possession in transferee.
2. Transfer before due.
3. Giving a valuable consideration.
4. Absence of knowledge of any infirmity of title of transferor.
5. Good faith of transferee.

In the instant case, Elements 1, 2 and 3 are admitted, but the claim of petitioner is that respondent does not bring itself within Elements 4 and 5, and to sustain the claim petitioner relies upon the proof of delivery of the mimeographed notice of the theft at the Davenport office as attributing actual *knowledge* of the defect in title of Connolly, the transferor, to the transferee, and as stamping the transaction as not in good faith.

To arrive at the condition of the law merchant with respect to these matters we need but refer to the cases already mentioned.

And first as to the definition of the Courts as to what is meant in the cases by the word "notice", as implying "knowledge".

In *Goodman* v. *Simonds*, 20 How. at 365, it is said:

> "If a bill of exchange, endorsed in blank, so as to be transferable by delivery, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen, and afterwards negotiated to one having no *knowledge* of these facts, for a valuable consideration in the usual course of business, his title would be good, and he would be entitled to recover the amount. • • • The word *notice*, as used by this Court on the occasion referred to, we think must be understood in the same sense as *knowledge*, and indeed that is one of its usual and appropriate significations. • • • (p. 366).
>
> But it is a very different matter when it is proposed to impeach the title of a holder for value, by proof of any facts and circumstances outside the instrument itself. He is then to be affected, if at all, by what has occurred between other parties, and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had *knowledge* of such facts and circumstances at the time the transfer was made.
>
> Nothing less than proof of *knowledge* of such facts and circumstances can meet the exigencies of such a defense. • • • (p. 367)

According to the rule laid down in *Goodman* v. *Harvey*, which indubitably is the settled law in all the English Courts, proof that the plaintiff had been guilty of gross negligence in acquiring the bill, ought not to defeat his right to recover; and if not, it serves to exemplify the magnitude of the error assumed in the

instruction, that any facts and circumstances which ought to excite the suspicion of a careful and prudent man were sufficient to destroy the title. It is clear that one or the other of these rules must be incorrect; both cannot be upheld. Gross negligence is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property; *and if such neglect would not defeat the right to recover—and clearly it would not, unless attended by bad faith—it cannot require any farther reasoning to demonstrate that the instruction was erroneous*".

The second criterion of validity of title which is a matter of controversy depends (at common law) upon the judicial pronouncements of what is sufficient evidence of "good faith". Respondent contends that its purchase of the bonds was not only without knowledge of any infirmity of title, but also that its purchase was in good faith. Petitioner has contended that bad faith should be inferred from the office system and practice of respondent in regard to notices of stolen bonds, that is, from negligence.

Under the law merchant, as administered by Federal and practically all other Courts at the time of the adoption in Illinois of the Uniform Negotiable Instruments Law, there was a unanimity of opinion as to what was and what was not sufficient evidence of good faith in the transaction which culminated in the purchase of a negotiable instrument.

Good faith cannot be impugned by proof of a suspicion of a defect in the title, or by knowledge of circumstances that might excite suspicion in the mind of a cautious person or even by gross negligence.

The only proof which will be sufficient to show bad faith is that which implies guilty knowledge or wilful ignorance.

Hotchkiss v. *Nat. Banks*, 1 Wall. 354 at 359.

As far back as 1895, the Supreme Court of Illinois in *Crouch* v. *First Nat. Bank*, 156 Ill. 342 at 357, adopted Anderson's definition, saying:

> "Good faith means 'honest, lawful *intent;* the condition of acting without knowledge of fraud, and without *intent* to assist in a fraudulent or otherwise unlawful scheme' ".

"Wilful ignorance", as used by the United States Supreme Court in the *Hotchkiss case*, of course, includes the same element of intent which is included in Anderson's definition, and mere gross negligence does not supply the element of intent.

Mr. Justice Cartwright shows the necessity for *intent* in any charge of wilfulness by his language in *C. R. I. & P.* v. *Hamler*, 215 Ill. 525 at 540:

> "But to warrant punishment there should be an actual or constructive intent to inflict the injury. Negligence and wilfulness are as unmixable as oil and water".

And Salmond says:

> "No result which is due to carelessness can have been also intended. Nothing which was intended can have been due to carelessness".
>
> Salmond on Jurisprudence, 7th Edition, page 409.

Ignorance brought about by negligence, no matter how gross, cannot be "wilful ignorance", for the epithet "wilful" connotes purpose or intent, and the fixed doctrine of

the Federal Courts is that even gross negligence of the purchaser of negotiable paper is not sufficient to authorize the inference of intent which is essential to that bad faith which will invalidate the title of the purchaser.

The definition of "good faith" adopted by the California Court in *Heney* v. *Sutro* (1915), 28 Calif. App. 702, 153 Pac. 972, from the case in Illinois (*Crouch* v. *First Nat. Bank*, 156 Ill. 342), is further elaborated by the Circuit Court of Appeals for the Second Circuit in *Gerseta Corp.* v. *W.-C. Silk Co.* (1924), 3 Fed. (2nd) 236, quoting from an opinion of Honorable William G. Choate in *Ward* v. *City Tr. Co.*, 102 N. Y. Supp. 50, in which the point was made that Section 95 of the Uniform Negotiable Instruments Act of New York (Section 56 of the Illinois Negotiable Instruments Act):

> "Is merely the declared rule of many courts, including those of New York, made into a statute; and that rule is that the notice of a defect or want of power in the transferor * * * to make a valid transfer must be a *knowledge* of such facts on the part of the transferee that his action in taking the instrument amounted to bad faith, *i. e.*, to dishonesty and absence of fidelity to the obligations of morals and honor".
>
> *Chi. Auto Sales Co.* v. *Peters*, 221 Ill. App. 363 at 367, citing *Bradwell* v. *Pryor*, 221 Ill. 602 at 605.

The Uniform Negotiable Instruments Act is but declaratory of the elements which go to make a holder in one cause, and does not deal with questions of sufficiency of evidence.

The sections of this act which are germane to the instant controversy are 52 and 56 of Article IV, which are as follows:

> "Holder in Due Course Defined. Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:
>
> 1. That the instrument is complete and regular upon its face.
>
> 2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact.
>
> 3. That he took it in good faith and for value.
>
> 4. That at the time it was negotiated to him he had no *notice* of any infirmity in the instrument or defect in the title of the person negotiating it.
>
> Notice of Infirmity—What Constitutes. Sec. 56. To constitute *notice* of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had *actual knowledge* of the infirmity or defect, or *knowledge* of such facts that his action in taking the instrument amounted to *bad faith.*"
>
> Cahill's Illinois Revised Statutes (1933), p. 1919.

That the framers of this act had in mind the law merchant as previously administered, and merely restated the law, using terms which then had a fixed and universal

meaning in that law, and had no design or purpose to change the law as it then existed, is most clear.

Chi. Auto Sales Co. v. *Peters,* 221 Ill. App. 363 at 367.

In defining "notice" as used in Section 52, the common law definition is imported into Section 56 by the use of the words "actual knowledge" and again the word "knowledge" is used in the phrase "or knowledge of such facts that his action in taking the instrument amounted to bad faith".

The phrase "bad faith" not being defined, it was the clear purpose of the drafters of the act that those words should have the signification which had theretofore been given to them by the Courts in the administration of the general or commercial law.

In every instance which we have been able to find in which the Courts have had occasion to consider these sections of the act, it has been held that they are declaratory of the law merchant, and not in derogation thereof.

Proposition I, Respondent's Brief, *supra*, page 3.

We submit, therefore, that this Court will not consider itself bound to follow the Second Division of the Appellate Court of the First District of Illinois in its opinion in *N. W. Nat. Bank* v. *Madison & Kedzie State Bank,* 242 Ill. App. 251, which case, the Supreme Court of Michigan, as late as June, 1932, characterized as one which, on the question here involved, "stands alone".

Merch. Nat. Bank v. *Detroit Trust Co.,* 258 Mich. 526, 242 N. W. 739 at 743.

The delivery of the notice of stolen bonds and the ignoring of it by an established office custom attributes neither knowledge nor bad faith.

The contention of petitioner would enable everyone who has had a negotiable instrument stolen from him, to force every dealer in such securities to be an insurer of his title by merely broadcasting through the mails printed or mimeographed notices of the fact of the theft. It would impose upon dealers in such securities an onerous duty and an imminent peril which would so hamper legitimate dealers in their transactions as to impair the liquidity and transfer of bonds to an unreasonable extent.

In other words one who is about to buy a bond, in order to get good title, must require an abstract of title from the transferor, as in the case of real estate.

In a case involving the title of a purchaser of a stolen bond Judge Baker in the Circuit Court of the District of Indiana, said in 1895:

> "Such negotiable bonds, in a certain sense are the representatives of money, and freely pass by delivery in the money markets of all commercial countries. To accomplish this purpose, the holder of a perfected bond must be deemed to be the true owner, and be able to invest an innocent purchaser for value and before maturity with an unimpeachable title. The title of a bona fide holder of such a bond ought to stand on as secure a foundation as that of a person who receives a bank note in the ordinary course of business. *Any other doctrine would, in my judgment, undermine the structure of commercial law, and shake the foundations of such paper credits*".
>
> *Long Island L. & Tr. Co.* v. *Columbus, C. & I. C. Ry. Co.*, 65 Fed. 455 at 457.

The English Courts, after abandoning in 1836, the discredited rule laid down in *Gill* v. *Cubitt*, 3 Barn. & Cress, 466, by the opinion of Lord Denman in *Goodman* v. *Harvey*, 4 Ad. & El. 870, have consistently ruled in such manner as to establish the free flow of negotiable paper and to disburden purchasers from fear of attack on their titles based on their negligence, even though gross, and since *Goodman* v. *Simonds*, 20 Howard, 343, was decided by the United States Supreme Court in 1857, the universal trend in the United States has been to free the transfer of negotiable paper from all shackles except those of bad faith growing out of actual present knowledge of the purchaser at the time of the purchase of a defect in the title of the seller.

The question of the obligation imposed upon dealers in securities by notices of theft arose in England at an early day in *Raphael* v. *Bank of England* (1855), 17 C. B. 161; 139 Eng. Reprint 1030.

In that case, Bank of England notes had been stolen and the original owner circularized a large number of bankers and brokers, one of whom, after receiving the circular, changed the notes.

An action was brought by the former holder of the notes, and in that action the transferee testified:

> "That it was the practice of the house to file all notices of stolen or lost notes served upon them and to look at them if the amount was important; but that on this occasion, he did not look at the file, and had no recollection of the notice, or he would not have taken the note".*

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*Compare Findings of fact by trial Court Numbers 8 and 9. (Rec. 107-108).

Counsel for the former owner contended that such conduct was so negligent as to amount to *mala fides* and invalidate the title of the transferee.

As is often the case in the English reports, the questions of the Judges to counsel in the course of the argument were as illuminating as the final opinions themselves.

During the course of the argument in favor of the proposition that disregard of the notice invalidated the title, *Jervis, C. J.*, asked counsel, "Suppose a man serves me with a notice that a certain bank note for 500£. has been stolen, and afterwards I, bona fide and in the course of business, change the note, giving full value for it in money —what is there to disentitle me to recover on the note?"

Cresswell J. asked, "What is the obligation that is cast upon the money changer from the receipt of a notice of this sort a year ago? Is his want of recollection of the notice *mala fides*?"

Crowder, J., asked, "Suppose, in going over the file, the notice had escaped St. Paul's attention—would that have negatived his right to recover?"

Jervis, C. J., asked, "Were those circumstances of suspicion to outweigh the fact of St. Paul's having given full value, and his want of knowledge of the loss at the time he took the note?"

The four judges were unanimous in the opinion that the taker of the note had good title, despite the notice of the theft.

Willes, J., in his opinion, said:

> "But, even if those gentlemen" (members of the jury seeking to impeach their verdict on the ground of misapprehension), "had at the time the verdict was being delivered, audibly expressed what they now say, it would have made no difference; for all they say

amounts to only this,—that notwithstanding St. Paul paid the full value for the note, and was ignorant at the time that it had been stolen, he was not entitled to be considered as a bona fide holder; that is *that his negligent mode of conducting his business disables him from being the bona fide holder in the particular case. That is, in truth an attempt to revive the exploded doctrine of Gill* v. *Cubitt*".

In *London Joint Stock Bank* v. *Simmons* (1892), App. Cas. at 219, Lord Herschell approves the opinion of *Willes, J.*, and at page 221 says:

"I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments".

Lord Field, in the same case, cites the *Raphael case* with approval, and says (page 227):

"In one of those cases, *Raphael* v. *Bank of England*, the plaintiff had, at some earlier period, received actual notice that the bank note in question had been stolen, but it was established to the satisfaction of the jury that the notice had been forgotten and was not present to his mind at the time of taking, and he was held entitled to recover."

In *Venables* v. *Baring Bros. & Co.*, (1892) 3 Ch. Div. 527, *Lord Kekewich*, said at page 542:

"Now I come to the question of negligence. I was referred to the case of *Raphael* v. *Bank of England*, 17 C. B. 161, which is certainly a case in point; because there was a bank note—undoubtedly a negotiable instrument—and it was held that the holder might sue upon it, *notwithstanding that when he took it he*

> *had the means at his disposal which would have enabled him to detect the bad title of his transferor; but of which means he neglected to avail himself.* Negligence was there held to be no defense whatever, and I apprehend that principle is really the guide to all the decisions."

In the interim between the *Raphael case*, decided in 1855, and the *London Joint Stock Bank case*, decided in 1892, the Supreme Court of the United States in 1874, had occasion to consider the question of bona fides of a purchaser of stolen securities in *Vermilye & Co.* v. *Adams Exp. Co.*, 21 Wall. 138.

In that case the securities in question were *past due* paper, and notice of the theft had been delivered to Vermilye & Company before that company purchased the paper.

The Court held that Vermilye & Company acquired no title because the fact the paper was *past due* was enough to put them on inquiry, and obligate them to refer to their files to ascertain whether there had been any notice affecting the paper served upon them, but the Court said:

> "By the well settled law of the case they" (bankers) "may purchase such paper *before due* without cumbering their minds or their offices with memoranda of such notices."

The *Raphael case* is not referred to, but it seems clear that the Supreme Court had that case in mind as being "the well settled law of the case."

It may be insisted here, as it was below, that the expressions in the *Vermilye & Company case* were mere dicta which this Court should disregard as did the Chancellor below.

In a sense, perhaps, the expressions in the *Vermilye & Company case* were dicta in that what was said was not absolutely necessary to the decision of the case, but there are two classes of dicta—*obiter dicta* and judicial dicta. The first being remarks of a Judge as argument or illustration drawn from some collateral question, and of little or no value as precedent, but the second being the deliberate language of the whole Court, used in expressing principles involved in the determination of the cause.

That eminent Wisconsin jurist, Cassoday J., has considered the question of dicta with his accustomed thoroughness in *Buckner* v. *C. M. & N. W. Ry.*, (1884) 60 Wis. 264; 19 N. W. 56 at 57.

> "It would seem that judges, as well as lawyers, sometimes differ as to what may properly be regarded as *obiter dictum*. It is not unfrequent, in courts of last resort, composed of several judges, for all to come to the same conclusion, but from different views of the law; and hence it may at times be difficult to determine the precise principle upon which the case was decided, or what may properly be deemed mere *obiter*. 'According to the more rigid rule' says Bouvier, 'an expression of opinion, however deliberate, upon a question, however fully argued, if not essential to the disposition that was made of the case, may be regarded as a dictum'.
>
> Under this 'more rigid rule', it is believed that, comparatively, there are few opinions in the books, which contain no *obiter dictum;* that is, nothing which was not absolutely essential to the disposition made of the case. Under that rule what is here being written is nothing but *obiter dictum*. But Bouvier adds that 'it is, on the other hand, said that it is difficult to see

why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause, that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung on but one point.'

Such dictum, if dictum it is, should it would seem, be regarded, as '*judicial dictum*', in contradistinction to mere *obiter dictum;* that is, an expression originating with the judge alone, while passing by the way, in writing his opinion, as an argument or illustration drawn from some collateral question."

In *Taylor* v. *Taylor,* (1931) 162 Tenn. 482; 40 S. W. 2nd 393 at 394, it is said:

"But, even though not essential to the decisions of the case, a statement in the opinion upon a point even incidentally involved, where apparently made with consideration and purpose, is at least a judicial dictum, as distinguished from mere *obiter dictum,* and is entitled to much weight. Moreover, insofar as an opinion *announces principles as a basis for the decision, it is in no sense dictum.*"

Union Pac. Co. v. *Mason City Co.,* 199 U. S. 160 at 166.

But whether the expressions in the *Vermilye & Company case* be considered as judicial dictum or as mere *obiter dictum,* there can be no question that the language of the Court, "By the well settled law of the case," indicates a more than passing or careless attention of the Court, and shows a judicial reflection upon the contra-distinguishing considerations between the rule as to obligation of the pur-

chaser as to inquiry when the paper is past due and not yet matured.

In at least two jurisdictions, the courts of last resort have considered the language in the *Vermilye & Company case* as *stare decisis* and not as dictum.

In *Heney* v. *Sutro & Co.*, (1915) 28 Calif. App. 702; 153 Pac. 972 at 974, there was a controversy as to the title to stolen securities, and it appeared that a circular notifying of the theft, had been delivered at the office of the purchaser prior to the transaction. In discussing the legal effect of such a notice, the Court said:

> "The fact that the defendant had at one time received notice of the plaintiff's loss was not sufficient of itself to fasten liability upon the defendant for the conversion of the bond in the presence of evidence tending to show that at the time of its purchase the defendant did not have in mind the plaintiff's ownership and loss. The failure of the defendant to keep and refer to a record of the plaintiff's loss as detailed in the notice given to the defendant's cashier is of no consequence in determining the relative rights of the parties to the action.
>
> *The defendant was under no legal obligation to incumber either its memory or the minutes of its business with a record of notices given to it of the loss of immature negotiable commercial paper.* (*Vermilye* v. *Adams Express Co.*, 21 Wall. 138, 22 L. Ed. 609), and therefore, notwithstanding the notice to its cashier, 'the defendant may well have purchased the bond in suit in good faith, for 'it is sufficient to constitute good faith that the holder has *no knowledge of the defect of title at the time when he took the instrument, although he may have had notice at some previous time.*" (Storey on Promissory Notes, p. 269, note.)

The California Court also cites as "precisely in point," *Raphael* v. *Bank of England*, 17 C. B. 161, from which we have heretofore quoted.

It is interesting to note that in the Illinois Appellate Court case, which petitioner insists should be followed by this Court, none of the pregnant English cases, the United States Supreme Court case nor the California case seem to have been brought to the attention of the Court, for they are not referred to in the opinion in 242 Ill. App. 22, perhaps upon the palpably erroneous idea of that division of the Illinois Appellate Court that the Uniform Negotiable Instruments Law had in some manner changed the established law merchant with respect to evidence which will establish the essentials of notice, knowledge and good faith.

It is also very significant, in considering the Illinois Appellate Court case (*N. W. Nat. Bank* v. *Mad. & Ked. State Bank*, 242 Ill. App. 22), that the same Court, speaking from the First Division, by *O'Connor, J.*, concurred in by *Matchett, P. J.* and *McSurely, J.*, on February 5, 1934, rehearing denied February 19, 1934, holds diametrically opposite upon the question of circularization, from the Second Division's opinion rendered October 5, 1926, by *Barnes, J.*, concurred in by *Gridley, P. J.*, and *Fitch, J.*

Nat. Bank v. *Uptown State Bank* (Adv. Sheets) 273 Ill. App. 401.

The later case does not even refer to the former opinion in the Second Division, but ignoring it, apparently as a judicial blunder of their brethren, holds that good faith of the purchaser cannot be impugned by proof of circularizing the theft of bonds, when the evidence of the official who actually made the purchase is that he had no knowledge of the theft or of the circular.

The question was sharply raised in the argument of counsel, the Court saying at page 404, that the plaintiff contended among other things, that before the bonds were purchased,

> "defendant was advised by the Illinois Bankers' Association through the mail that the bonds had been stolen and therefore defendant was not a bona fide holder in full."

The Court denied the contention upon this point, and followed the general law of commercial paper as construed by the Federal Courts, citing Sections 52 and 56 of the Illinois Uniform Negotiable Instruments Law. As to the disapproved contention the Court says (pp. 404, 405):

> "There is evidence in the record that the Illinois Bankers' Association mailed to its members, including plaintiff and defendant, a typewritten bulletin under date of April 4, 1930, the third item of which stated that it had been reported that the bonds in question had been stolen. But the evidence does not show specifically that a copy was mailed to defendant. *But even if the evidence might be held sufficient on this point,* defendant's cashier, who had the transaction with Farry, testified that he did not know anything about the bulletin and had received no information that the bonds were stolen. Obviously, he would not have taken the bonds as collateral if he had been advised that they had been stolen. *It is clear that defendant, through its cashier, acted in good faith in accepting the bonds as collateral. This is all the law requires. Bradwell* v. *Pryor,* 221 Ill. 602; *Chicago Auto Sales* v. *Peters,* 221 Ill. App. 363; *Chicago Bank of*

Commerce v. *Kraft*, 269 Ill. App. 295; Secs. 52 and 56, ch. 98, Cahill's 1933 Statutes, Pars. 72, 76."

Nat. Bank v. *Uptown State Bank*, (Ill. App. Court, 1st Division, 1st Dist. Feb. 5, 1934) 273 Ill. App. 401 at 405. Advance Sheets, March 15, 1934.

The most recent case in a court of last resort upon the question now under consideration is *Merchants Nat. Bank* v. *Detroit Trust Company*, (Mich. 1932) 258 Mich. 526; 242 N. W. 739, and that Court considers the language of the United States Supreme Court in the *Vermilye & Company case* as *stare decisis* and not dictum.

The Michigan Court asks itself the question, Was the evidence sufficient to establish the defendant a holder in due course under sections of the Michigan Uniform Negotiable Instrument Act, which are Sections 52 and 56 of the Illinois Act.

The action was by the former owner to recover negotiable unmatured bonds which had been stolen from him, from a dealer who had acquired the bonds as collateral to a loan to the thief.

The same procedure as to sending out notices of the theft to bankers and dealers which was pursued in the case at bar had been adopted, and there was proof of mailing such a notice to the purchaser (defendant).

The Court held that proof of the mailing raised a presumption of delivery, and also held that the burden was on the purchaser to prove that it was a holder in due course.

The Court said:

"All of the officers of the defendant company having to do with the loan in question testified that they

did not see the notice and had no knowledge of it or of any circumstance tending to show a defect in the title to the bonds. According to the defendant's custom, mail addressed to the Detroit Trust Company and not to any particular person or department was opened by one of the mail clerks and sent to the person in charge of the business to which it related. Following this custom, the plaintiff's notice, if received in the mailing department, would be sent to Mr. Butler, Vice President in charge of the financial department, then to Mr. Miller, Assistant Treasurer, and finally to Mrs. Irving, collateral loan teller. All of these officers had a part in the loan for which the bonds were accepted as collateral. *We have no reason to doubt their testimony that they did not see or receive the notice. But, assuming that it was received, that they saw it and forgot about it or carelessly mislaid it so that it was not in their minds at the time they acquired the bonds, or assuming that it was received but through the carelessness of the mailing clerk it was not brought to the attention of the officers, how would these facts affect the company's title as holder in due course.*"

It is not often that the facts of a case presented for decision to a Court are so closely paralleled by the facts in a case decided by a Court of last resort as do the facts in the case at bar with those in the Michigan case, and we believe this parallel occurs because, as is shown by the record, and by the cases which we have cited, it is the universal custom among those dealing in commercial paper, relying on the law merchant as laid down in the *Vermilye & Company case*, not to encumber their files or their memories with these wails of distress from losers of negotiable paper, because it would be impossible to carry

on their business, as a practical matter, if, whenever a piece of unmatured paper was presented for sale, the law required a search of the files to ascertain whether, at some past time, a notice had been received that the particular bond or what not, had been stolen.

The Michigan Court answers its own question in the affirmative, holding that the evidence was sufficient to establish that the purchaser, even granting that the notice was received, was a holder in due course because there was no

> "evidence in contradiction of the officers that they did not see the notice or acquire knowledge of its contents" (242 N. W. 742).

In support of its conclusion, the Court relies among other authorities, upon *Vermilye & Co.* v. *Adams Express Co.*, 21 Wall. 138, and there seems to have been no contention that the language relied upon was dictum and not *stare decisis.*

The Illinois Appellate Court case (*N. W. Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22), is discussed by the Michigan Court and dismissed with the following comment (242 N. W. 743):

> "As far as we have been able to determine this case stands alone. It estops the purchaser from showing good faith at the time the bonds are acquired. It makes notice of theft conclusive evidence of *mala fides. It overlooks* the well established rule" (*i. e.*, the rule in the *Raphael case*, which was evidently before the United States Supreme Court in the *Vermilye & Co. case*), "'that, though one has received actual notice, if, by forgetfulness or negligence, he does not have it in mind, when he acquires the bonds, he may still be a good faith purchaser.'"

The Court then cites and quotes from *Lord* v. *Wilkinson*, 56 Barb. (N. Y.) 593, in which it was held that an instruction "that the defendants once having had notice, are bound by it, although the notice may have been forgotten", was erroneous.

The case of *Seybel* v. *Nat. Currency Bank*, 54 N. Y. 288, cited in the Michigan case, does not cite the *Vermilye & Co. case*, but it contains an elaborate discussion of the doctrine of good faith in a case involving the title to stolen securities, and holds, after elaborate discussion, that there is left no remnant of the doctrine that the negligence of the purchaser, even gross, would invalidate his title.

On page 302, as to notices of theft, the Court says that it must

> "Be deemed to be the settled law that the defendant was under no obligation to make any inquiry of the person who offered the bonds in question for sale as to his right or title thereto, or to take any special precautionary measures in the purchase of securities by which the interest of other parties should be protected; and if it could be deemed chargeable with want of caution or even negligence in the omission of its cashier or any of its officers to take up and read the notices of the theft that were left on its desks, it was not by reason of such omission alone deprived of the protection of a bona fide purchaser."

The denial of certiorari by the Supreme Court of Illinois, does not have the effect of a decision of the highest court, construing the Uniform Negotiable Instrument Act as petitioner claims it was construed in the Appellate Court in the case of Northwestern Nat. Bank v. Madison & Kedzie State Bank (supra).

The major dependence of Petitioner in this Court is placed upon the proposition enunciated in *Burns Mortgage Company, Inc.* v. *Fried*, 292 U. S. 487 and *Marine National Exchange Bank* v. *Kalt-Zimmers Manufacturing Company, et al.*, ... U. S. .....; 79 L. Ed. 208, to the effect that Federal Courts are bound by the decision of the highest court of a state construing a state statute even though such statute is but declaratory of the common law.

Petitioner then asserts that the case of *North Western Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22, by reason of the denial of certiorari by the highest court of Illinois (the Supreme Court) has become a construction of the state statute by the highest court and that this Court is bound thereby.

Two misconceptions, we submit, are at the foundation of that position.

First. The question decided by the Appellate Court was not a question of statutory construction, but a question of fact, *i. e.* the factual inference from the receipt of the circular that the purchaser of the paper in that case had knowledge or notice of the infirmity of the title of the seller.

Second. The denial of certiorari by the highest court of Illinois, does not make the decision of the Appellate (intermediate) Court such a decision as will foreclose this

Court from using its own independent judgment upon a question either of commercial law, or statutory construction.

First.

In the case of *Burns Mortgage Co.* v. *Fried, supra*, the question was whether a certain instrument was negotiable, and the Florida Supreme Court had construed the Uniform Negotiable Instruments Law adopted in Florida, in such manner that the instrument was negotiable. This was pure construction of uncertain language of the statute, and this Court considered itself bound by the construction.

The same question of negotiability recurred in *Marine Nat. Exchange Bank* v. *Kalt-Zimmers Manufacturing Co., supra*, and this Court held that inasmuch as the highest court of Wisconsin had so construed Wisconsin's statute as to render the particular instrument negotiable, this Court was bound by such construction of the language of the statute.

Also in the latter case, the Wisconsin Court's adherence to the rule in *Murray* v. *Lardner*, 2 Wall. 110, 121 was "accepted as the law of the Wisconsin Court."

The Illinois Appellate Court case, upon which Petitioner relies as a construction of the Negotiable Instruments Act by the highest court of Illinois to the extent of foreclosing this Court from exercising its independent judgment upon a question of commercial law, neither construes nor interprets any ambiguous or uncertain language of the Act. It simply accepts the language used as defining holder in due course in Section 52 and as defining notice of infirmity in Section 56 as unambiguous, plain and certain, and then finds as an ultimate fact, upon the evidentiary facts, that in that case there was sufficient evidence to justify the

factual inference that the purchaser of the paper had notice of an infirmity of the title of the person negotiating it, (Sect. 52 of the Illinois Act), and that the evidence was sufficient to authorize the factual inference that the transferee had actual knowledge of the infirmity or defect, (Sect. 56 of the Illinois Act).

It is merely the holding of the Appellate Court that in its opinion, under the unambiguous language of the act, whether it be declaratory of the law merchant, or in derogation thereof, the receipt of the notice of the theft by the mailing clerk, authorized the *factual* conclusion that the transferee had actual knowledge, and consequently was charged with notice.

The Illinois Negotiable Instruments Act had laid down a rule of legal liability, *i. e.*, that if the transferee had "actual notice" of the infirmity of the title he was not a bona fide purchaser. The statute does not pretend to prescribe what facts proven will justify the conclusion of ultimate fact that there was notice.

The holding of the Illinois Appellate Court does not construe the statute, it merely holds that the statute provides that "actual notice" will invalidate the title, and then makes an inference from the fact of receipt of the circular, and from the law of agency, that there was "actual notice". This is not an interpretation or construction of the Act by which a Federal Court will be bound, but is an inference of fact from evidence (*i. e.*, that there was notice).

The Supreme Court of Illinois has recently reiterated in *Paine* v. *Sheridan Trust & Savings Bank* (1930), 342 Ill. 342 at 348 that "whether one has notice of a certain fact is a question of fact and not of law," and of course, the only question passed upon by the Illinois Appellate Court in the case relied upon by Petitioner was whether the fact of notice was properly inferable from the evidence that a

circular advising of the theft had been received in the office of the transferee.

"It has been held that, where constructive notice is to be determined by the circumstances of a particular case, it is ordinarily a question of fact for the jury; that whether a party has notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and whether 'by prosecuting such inquiry, he might have learned such fact,' are questions of fact." 46 Corp. Jur., Title Notice, p. 569, § 112.

In the case of *Paine* v. *Sheridan Trust & Savings Bank*, *supra*, may also be found the reason for the Supreme Court's denial of certiorari in the Appellate Court case relied upon by Petitioner, which reason is a far cry from the contention of Petitioner that by such denial the decision of the Appellate Court became the decision of the Supreme Court as a construction of the statute binding on this Court.

Under the Illinois Practice Act in force at the time of the denial of the certiorari in the Appellate Court case relied upon by Petitioner, it was provided:

"§ 122. The Supreme Court shall re-examine cases brought to it by appeal or writ of *certiorari* as provided in this Act, from the Appellate Courts, as to questions of law only; and in the cases aforesaid, no assignment of error shall be allowed calling in question the determination of the inferior or appellate courts upon controverted questions of fact therein." Cahill's Illinois Revised Statutes (1931), Chapter 110, Section 122, page 2189.

Undoubtedly, when the record in *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22, went to the Supreme Court with the petition for certiorari, that

Court discerned at once that the only question involved was a determination of the Appellate Court upon a controverted question of fact, viz., the question of notice which the Supreme Court has always held to be a question of fact.

In *Paine* v. *Sheridan Trust & Savings Bank, supra*, the Supreme Court allowed a certiorari to review the judgment of the Appellate Court, which reversed a judgment of the trial court, and the question arose, whether there was such notice of infirmity of title in the transferee of a check as under Sects. 52 and 56 of the Negotiable Instruments Act, would prevent the transferee from being a holder in due course.

The Appellate Court had held in reversing the judgment of the trial court, "that defendant bank had notice or was put upon notice of these facts," (342 Ill. at 346)

The Supreme Court states, "The question here concerns the effect of this finding of fact on this appeal." (p. 347). After discussing the law of Illinois as to whether notice is a question of law or fact, and concluding that it was a question of fact, the Court says (p. 348), "This court is barred by the finding of fact of notice if there is any substantial evidence to support such finding."

After considering the evidence in the record as to notice, the Court says, (p. 349):

> "We have referred to this evidence in the record to show that there existed therein substantial evidence to support the Appellate Court's *finding of fact* that the plaintiff in error bank was not a holder in due course as defined by the Negotiable Instruments Act. *That issue is therefore not open for further consideration here, and as it is the ultimate fact on which the case of the plaintiff in error bank is bottomed, the judgment of the Appellate Court will be affirmed.*"

In the case in the Appellate Court relied upon by Petitioner, the question was the same, *i. e.*, whether on the evidence the transferee had notice of an infirmity of title in the transferor. The Appellate Court found as a fact that there was such notice, and the case turned upon this question of fact, and was decided by the Appellate Court upon its finding of fact that there was notice. The Negotiable Instruments Act was not construed, but a mere factual conclusion was reached.

Therefore, when the petition for certiorari in the case of *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank* reached the Supreme Court, it seems clear that that Court realized at once that it turned upon a question of fact, not of law,—a question which by statute was foreclosed by the finding of the Appellate Court, "not open for further consideration" by the Supreme Court, and inasmuch as to grant the certiorari would be a nugatory act, the certiorari was denied.

The only conclusion which can be reached from the denial of the certiorari in that case is that the question sought to be raised in the Supreme Court was one of fact upon which the Supreme Court was foreclosed by the finding of fact by the Appellate Court.

This being evident, the contention by Petitioner that this Court should regard the denial of the certiorari as an adoption by the Supreme Court of a construction of the Negotiable Instruments Act to the extent of preventing this Court from exercising its independent judgment upon a question of commercial law, must be fallacious.

Second.

We venture to assert that the denial of certiorari by the highest court of a State has never been considered to

be an adoption of the views of the intermediate court to the extent of making the decision of the intefmediate court the decision of the highest court of the State.

Under Section 121 of the Illinois Practice Act in force at the time, the denial of a certiorari renders the *judgment* of the Appellate Court final, but this enactment does not have the effect of rendering the *opinion* of the Appellate Court final or *stare decisis* in any cause other than that in which the opinion was filed (Cahill's Ill. Rev. Stat. 1933, Appendix, page LXXVI, par. 120).

Non constat but that the Supreme Court may disagree wholly with the reasoning of the Appellate Court's *opinion,* and still decline to review the judgment, or find that it has no jurisdiction to review.

It must be borne in mind that the statutory certiorari was not a matter of right, even if a showing was made, but a matter of grace, resting in the uncontrolled and non-reviewable discretion of the Supreme Court. In granting a certiorari, or in denying it, the Supreme Court was governed only by its non-reviewable judicial discretion, and was required to give no reason for its action.

If, upon general principles, or what are sometimes called "the fireside equities", the Supreme Court believed the *judgment* of the Appellate Court was right, it could and, as every lawyer knows, often did deny certiorari when it was manifest that the reasons given by the Appellate Court in its opinion were absolutely wrong and without legal foundation.

> "The denial of the writ of certiorari therefore, meant nothing more than that we approved the conclusion of the Appellate Court that the State's Attorney should have signed and presented the petition. *It did not mean that we approved the reasons set out in the opinion of that Court and its determination of*

the merits of the case, and the rights of the parties to be affected by the information when filed (*Soden* v. *Claney*, 269 Ill. 98.)"

People ex rel. v. *Grant*, 283 Ill. 391 at 397.

In this last cited case when it was in the Appellate Court (*People ex rel.* v. *Grant*, 1st Dist., 208 Ill. App. 235), that Court devoted very earnest attention to the contention that a denial by the Supreme Court of a certiorari is tantamount to an expression of opinion by the Supreme Court in accordance with the views expressed in the opinion of the Appellate Court.

The contention was disapproved, the majority of the Court saying (208 Ill. App. at 239, *et seq.*):

"On the argument it was further suggested that as an application had been made to the Supreme Court in that case for a writ of certiorari and denied, the court, by such action, passed upon the merits of the controversy, and thus declared itself to be in harmony with the conclusion reached by the Appellate Court. This contention, in our judgment, involves an entire misconception of the purpose and effect of the statutory provisions in regard to writs of certiorari. Those provisions are substantially identical with a section of the United States statute providing for the issuance of writs of certiorari to the Circuit Court of Appeals.

* * *

"It seems a conclusive answer to the relator's contention to say that, during the 26 years that the United States certiorari act has been in force, there does not appear to be a case in which counsel have suggested that the Supreme Court, by denying the writ of certiorari, stamped the conclusions of the Court of Appeals with its approval, and impliedly made a dec-

laration in regard to what was the law. The language of the statute does not require our Supreme Court to issue a writ of certiorari in any case, but merely provides that it shall be competent for it to do so; nor does it require the court to pass upon the merits of the controversy presented, but leaves that to the discretion of the court, to be exercised in every case. So, in the case cited here, the question considered upon the application for the writ was not necessarily the one as to the correctness of the conclusions of this court. The Supreme Court first had presented to it the question of whether there was anything in the circumstances of the case which made it expedient for it to pass upon the merits of the controversy and to declare the law. Obviously it was competent for the Supreme Court to go into the merits of the contentions made in the petition, but it was equally competent for it to say that as, under the decision of the Appellate Court, the questions involved would again be presented in a *quo warranto* proceeding in which all the parties in interest would be before the court, it would be better to pass upon them in that case, in which a binding adjudication of the rights of all the parties could be made. Any inference, therefore, as to the opinion of the Supreme Court in regard to the correctness of the conclusion reached by the Appellate Court must necessarily rest upon speculation and conjecture. The function of finally declaring the law of the State rests with its Supreme Court, and is accomplished by means of its opinions, in which it speaks through its justices. The only safe rule would, therefore, appear to be that its conclusions in regard to the law are to be found in its reported opinions, and not deduced inferentially from its action in denying writs of certiorari.

* * *

> "The effect of a denial of a writ of certiorari, though conclusive, is purely negative. By its action, the Supreme Court does not review the judgment of the Appellate Court, but declines to do so. This does not make the judgment of the Appellate Court final, but it leaves its finality undisturbed. For these reasons we are constrained to hold that the action of the Supreme Court in denying the State's Attorney's petition for a writ of certiorari in the case cited does not constitute an authoritative declaration in regard to the questions of law involved, and that so far as any action by the Supreme Court is concerned, these questions are still open. It, therefore, devolves upon us to consider the merits of the points presented."

The Supreme Court of the United States, in *Minn. St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410, at 412; 73 L. ed. 766 at 768, construes Sec. 121 of the Illinois Practice Act (the Certiorari section) with reference to the effect of a denial of certiorari, and says:

> "While such denial is not an approval of the reasons on which the Appellate Court rests its judgment, it is an approval of the conclusion reached by it."

We submit that "conclusion" is used by the Court in the sense of "judgment", not reasoning or statutory construction.

The certiorari provisions of Section 121 of the Illinois Practice Act of 1907 are clearly modeled upon the certiorari provisions of the Federal Circuit Court of Appeals Act (Judicial Code, Sec. 347, which is the old Section 240 as amended).

There is a discretionary power in both the Federal and the Illinois Supreme Courts to bring up by certiorari for

review, the judgments of the intermediate court, but it has never been considered by the Federal Courts that a denial by the United States Supreme Court of a certiorari to review a judgment of the Circuit Court of Appeals was an affirmance of the views of that Court, or an adoption or sanction of such views.

In *Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251 at 258, the Court says:

> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ" (certiorari) "is in no case equivalent to an affirmance of the decree that is sought to be reviewed."

Again, in *U. S.* v. *Carver*, 260 U. S. 482, at 490; 67 L. ed. 463, Mr. Justice Holmes said:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case *as the bar has been told many times.* Therefore, it is unnecessary to consider whether the libellants' argument is supported by the decisions to which they refer" (*i. e.*, decisions of Circuit Court of Appeals in which certiorari had been denied). *Cited in Atl. Coast Line R. R. Co.* v. *Powe*, 283 U. S. 401 at 404.

In *Hudson* v. *Maryland Casualty Co.*(C. C. A., 8th Circ.) 1927) 22 Fed. 2nd 791, the Circuit Court of Appeals had occasion to consider the effect of a decision of an intermediate appellate court of Missouri as to construction of a Missouri statute. In denying the contention that the Federal Courts were bound by a construction of a Missouri statute placed upon it by the intermediate appellate court (which seems to be in all respects equivalent to the Appellate Courts of Illinois), Stone, Circuit Judge, said:

> "It is true that for some purposes and in some senses these Courts of Appeals are courts of final re-

sort. There is no *positive right* to a review of their decisions by the Supreme Court of the state. In that sense their decisions are final and in that sense the Supreme Court of the state has referred to them as courts of 'last resort.'

* * *

"But the rule now invoked is one of federal procedure and its meaning must be sought in its purpose. That purpose is for federal courts to apply the state statute as that statute has been authoritatively declared by the highest court of the state. Until the court of last resort, as personified by the highest state court which can speak upon the subject, has spoken, there can be no such finality of decision as required by the rule. The highest court of Missouri is the Supreme Court. Its decisions are controlling upon the three Courts of Appeals of that state (Const. Mo., art. 6 (Amendment of 1884), Sec. 6) and decisions of such Courts of Appeals have not the force of *stare decisis with the Supreme Court.*

* * *

"Each of these Courts of Appeals has a separate geographical jurisdiction and a decision by one such court is binding only within its jurisdiction. Where these courts disagree, there is a divergence of authority even within the state and such differences have occurred. No one nor all of them can *finally* announce the law of the state, only the Supreme Court of the state can do that. This court has great respect for the opinions of the learned judges of these Courts of Appeals and will always give careful attention to the reasoning in their opinions; but persuasive force of reasoning and binding authority of decisions are dif-

ferent matters based upon different considerations. The harmony of decision desirable and sought by the federal rule of construction is harmony with the law as declared for the entire state by the highest state court which could determine the matter. In our judgment, the Courts of Appeals of the State of Missouri are not such courts."

It therefore appears certain that the mere assumption, without authority to support it, indulged in by counsel for petitioner, that the opinion of the Appellate Court, in the *Northwestern Nat. Bank case* was binding on the District Court and the Circuit Court of Appeals cannot prevail, and the Circuit Court of Appeals was correct in holding that:

"It is, however, only the decisions of the highest courts of the states that are binding upon us. *Hudson* v. *Maryland Casualty Co.*, 22 F. (2d) 791 (C. C. A. 8).

The fact that the defeated party sought to review the decision in the *Northwestern Nat. Bank Case, supra*, and the Supreme Court of Illinois denied its application for a certiorari makes that decision no more authoritative. *People* v. *Grant*, 283 Ill. 391, 397, 119 N. E. 344; *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410, 49 S. Ct. 363, 73 L. Ed. 766; *United States* v. *Carver*, 260 U. S. 482, 43 S. Ct. 181, 67 L. Ed. 361. The rule announced in said *Northwestern Nat. Bank* Case, *supra*, has not been approved or passed upon, by the Illinois Supreme Court.

It becomes our duty, therefore, to examine the question in the light of all of the decisions of state and Federal courts and follow the United States Supreme

Court decisions, if there are any in point; otherwise to announce that decision which in our opinion is in accord with the weight of reason and authority."

White-Phillips Co. Inc. v. *Graham*, 74 Fed. 2nd 417.

The fact that review of the decision of the intermediate court by the highest court of the state has been denied, thus making the *judgment* of the intermediate court final, does not have the effect of a decision of the highest court of the state so that the Federal Courts will follow it.

Cont. Secur. Co. v. *Interborough R. T. Co.*, (Circ. Ct. So. Dist. N. Y. 1908) 165 Fed. 945 at 959.

The Burden Was On Respondent to Show Good Faith and this Burden Was Carried.

This was a question of fact, not of construction of a statute.

Under Section 59 of Article IV of the Uniform Negotiable Instrument Act, which is merely a restatement of and declaratory of the law merchant, proof that the bonds were stolen threw the burden on Respondent to prove that it "acquired the title as a holder in due course."

This burden Respondent accepted *in limine*, and having admitted that the bonds had been stolen from Petitioner, Respondent proceeded with frankness and without suppression, to call every officer or agent who had anything to do with the purchase of the bonds as witnesses (Rec. 26-33, 40-43, 49-55). They detailed the whole transaction and voluntarily put in proof of the receipt of the notice at the Davenport office and the routine handling of it.

The record shows (pp. 33, 34, 35, 38, 39, 45-47, 57, 58, 59) that even at the Davenport office (which was not where

the purchase took place), when the notice was received, according to the office routine, it went upon the hook which was the "snapper up of unconsidered trifles," and that no responsible officer or agent at Davenport ever saw it until after the purchase had been made by the Chicago office, and the bonds forwarded to Davenport, where it was then discovered by the merest chance (Rec. 46).

While Petitioner's evidence may at a stretch, be considered as showing proof of mailing to the Chicago office, the evidence of every employee at that office, even to the stenographers, rebuts the presumption raised by the supposed proof of mailing, and shows that it was never received (Rec. 29, 41, 53, 59, 60).

Every officer or agent who had anything to do with the purchase of the bonds testifies that he had never seen the notice and had no knowledge that any such notice had been sent out and had no knowledge that the bonds had been stolen, and the Trial Court so found. (See record page 108).

In the language of the Michigan case (242 N. W. at 742), the Trial Court could have said, "We have no reason to doubt their testimony that they did not see or receive the notice," nor can any ingenuity or insinuation of counsel for Petitioner find anything in the record to justify any reflection upon the veracity, business probity or standing of any officer or agent of appellant.

Counsel for Petitioner endeavor to give the impression that there was some omission or lack of proof in showing absence of knowledge on the part of Respondent, because it appears that there were 27 employees in the Davenport office and 5 or 6 in the Chicago office and Respondent examined but six from Davenport and four from Chicago (Brief of Petitioner, pp. 33-34).

It is true that the evidence shows that the numbers of employees were as stated. (Trans. Rec. p. 30).

But is is equally true that the general system of purchase of bonds was explained by Blair A. Phillips (Trans. Rec. 26-30), and that the evidence shows that every employee, both in Davenport and in Chicago, who had anything to do with either the purchase of bonds or the handling of the notices concerning stolen bonds was called and examined.

In Davenport, the mail was opened and distributed by Offerman, Drum and Crowe (Trans. Rec. 39), and all three of these were called, (Trans. Rec. 39, 57, 58) and described the handling of the notices.

Vernon Ehlers, who was in charge at the Davenport office was called, (Trans. Rec. 43), and described the office routine. (Trans. Rec. 45).

Stutz, the buyer at the Davenport office was called, (Trans. Rec. 37) as was Alexander, the Vice President and Treasurer whose duties were in connection with the Davenport office. (Trans. Rec. 33).

The responsible dealing officers or traders in the Chicago office were Bell and Schriefer, (Trans. Rec. 29) and both of these were called. (Trans. Rec. 40, 49).

Every other Chicago employee was called. (Mrs. Schriefer, Rec. p. 59; Mrs. Bell, Rec. p. 60).

Bell, who personally handled the Connolly transaction, testified that Phillips, Schriefer and himself, together with two stenographers were all of the Chicago employees. (Trans. Rec. 52).

Bell testified that he had no notice of knowledge of any taint on the securities (Trans. Rec. 52) as did. Phillips (Trans. Rec. 29) and Schriefer (Trans. Rec. 41), and the two stenographers in the Chicago office both testified that

they had no knowledge that any circular had been received there. (Trans. Rec. 59, 60).

In the face of this showing, it seems idle to contend that because other employees at Davenport, who are not shown to have had any duties either as to purchase of bonds or handling notices concerning stolen bonds were not called, there was any defect of proof.

Respondent's Brief, Sec. III, p. 7, *supra*.

This question was purely factual,—and the Illinois Appellate Court in the case relied upon by Petitioner so treated it.

No legal question was involved,—no statutory construction necessary.

The decision of the Appellate Court cannot be availed of by Petitioner as a construction of an Illinois Statute in order to prevent this court from exercising its independent judgment on a pure question of commercial law.

The Supreme Court of Illinois has held that as to transfers of negotiable paper, the question of notice of infirmity of title is not a question of law, but a question of fact.

Paine v. *Sheridan Trust & Savings Bank* (1930), 342 Ill. 342 at 348.

So far as our research has disclosed, the principle of the Michigan case, that good faith is established by the testimony of all the persons having to do with the purchase of the securities, is acceded to by the overwhelming weight of authority.

Respondent's Brief, *supra*, page 7.

It has even been held that the unimpeached testimony of the officer or agent who made the purchase that he had no knowledge of any defect of title in the transferor is

sufficient by itself to compel a directed verdict in favor of the purchaser in a case tried to a jury.

Upon a rehearing of *Jerke* v. *Delmont State Bank*, 216 N. W. 362, the South Dakota Supreme Court changed its former opinion, by an opinion rendered February 8, 1929, and reported in 223 N. W. 585, which exhaustively discusses the conflicting views as to the right of the Court to direct a verdict upon the testimony of an interested witness, and finally concludes, in accord with the weight of authority, that the Trial Court should have directed a verdict in favor of the purchaser bank, even though the only testimony as to good faith was that of the president of the bank, who carried out the transaction. The salient parts of the opinion will be found beginning on page 592 of 223 N. W. Rep.

The Cases Relied Upon by Petitioner Distinguished.

We have sufficiently pointed out the misconception of Petitioner in his reliance upon the Illinois Appellate Court case of *N. W. Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22.

Aside from that case, and a criticism of the Michigan case of *Merch. Nat. Bank* v. *Detroit Trust Co.*, 258 Mich. 526, Petitioner also charges that the Circuit Court of Appeals overlooked its own ruling in *C. F. Childs & Co.* v. *Harris Trust & Savings Bank*, 27 Fed. 2nd 633. An analysis of that case will disclose that the opinion of *Carpenter, J.,* does not support the contention.

In that case, the facts were wholly diverse from the state of facts in the case now before the Court, and the crucial legal proposition in that case, upon which the decision turned, is wholly absent from the instant case.

The salient facts in the *Childs case*, divested of unimportant detail are as follows:

An employee of Childs, on September 6, 1921, stole Liberty Bonds of the par value of $25,000 from Harris without the knowledge of Childs. The next day Childs received from Harris a notice of the theft, giving the numbers and denominations of the bonds.

The thief kept the bonds in his possession until June, 1922, and on June 10, 1922, the thief substituted for bonds *owned by Childs*, which were being shipped to New York, *the stolen* bonds, keeping the bonds which were the property of Childs.

At the time of this substitution, Childs had had repeated notices from Harris, giving the numbers and denominations of the stolen bonds.

In sending out the package of bonds to New York, a true list of numbers and denominations of the shipment of bonds which were the actual property of Childs, was included, but when the bonds got to New York, $25,000 of stolen bonds had been substituted by the thief for an equal lot of the bonds owned by Childs. Upon arrival of the shipment in New York, Childs' New York office did not check the bonds received with the enclosed list. If they had so done, the substitution of the stolen bonds, of the theft of which Childs had undisputed knowledge, would have been disclosed.

In the *Childs case*, the firm of C. F. Childs & Company did not get the bonds in the usual course of trade and did not give value for them. The Court disposes of this contention adversely to C. F. Childs & Company, and holds:

1. That there was no negotiation of the bonds to Childs.

2. That Childs gave no value for them, and

3. That if the substitution of the stolen bonds by the thief could be treated as a negotiation, Childs in taking such a position is bound by the guilty knowledge of the thief, its own agent.

There can be no question that Respondent, White-Phillips Co., Inc., took the Illinois highway bonds in the usual and ordinary course of business and for value. The evidence establishes these two elements beyond peradventure, and thus the ratio *decidendi* and crucial point in the *Childs case* is wholly absent in the instant case as shown by the following excerpt from the opinion (p. 635):

> "No citation of authorities is needed on the proposition that, if Childs knew of its thief employe's part in the drama, it was found to make full recompense to Harris. Childs' claim as holder for value under the Illinois Negotiable Instruments Law is not sound, because there was no negotiating between Childs and its thief employe, and because, if Childs chooses to treat it as a *negotiation* (*ex parte* to say the least), it must adopt the transaction *in toto*, charged with the guilty knowledge of the wrongdoer, its agent and servant."

CONCLUSION.

There is here presented an attempt to found a solitary exception in a single state to an universally accepted doctrine of the law of commercial paper, upon the decision of an inferior court of Illinois, concerning which the highest court of a respectable jurisdiction has said "As far as we have been able to determine, this case stands alone" (*Merch. Nat. Bank* v. *Detroit Trust Co.*, 258 Mich. 526), which decision is in conflict with a later holding of another co-ordinate branch of the same inferior court (*Nat. Bank* v. *Uptown State Bank*, 273 Ill. App. 401 at 405).

We submit that it is not upon such tenuous grounds that this court should overset a time honored, established and recognized rule of the law merchant, bottomed upon principle and essential to the free and liquid flow of negotiable paper.

Wherefore, respondent respectfully submits that the judgment of the Circuit Court of Appeals should be affirmed.

All of which is respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1935.

Richey V. Graham, Petitioner,
vs.
The White-Phillips Company, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 11, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

By an appropriate proceeding, the Treasurer of Illinois sought an adjudication determining the ownership of eight one thousand dollar negotiable coupon bonds issued by the State. They were stolen from their lawful owner, petitioner Graham, August 30, 1930 and on Sept. 22, 1930 were purchased for a fair price in the ordinary course of its business by respondent's Chicago office from Connolly, listed dealer at St. Paul, Minnesota. No circumstance suggests conscious wrongdoing by the purchaser.

Three days after the theft, petitioner caused the Foreman corporation to send printed notices of it, with adequate descriptions of the bonds, to dealers throughout the country.

Accepting the record upon the view most favorable to the petitioner, we may assume, as the Circuit Court of Appeals did, that the notice was received by respondent's main office in Davenport also at the Chicago branch, prior to the purchase; there was absence of ordinary care upon the part of the Chicago branch in not making more elaborate provision for dissemination of the knowledge given by the notice; that respondent paid full value; at the time of the purchase it had no actual knowledge of the theft; it made no investigation to ascertain whether the bonds were stolen, other than to inquire concerning the status of the party offering them; the information given by the notice had been forgotten.

The District Court declared, as conclusion of law:

> "The respondent, The White-Phillips Company, Inc., by reason of having actually received, prior to its purchase of the securities here involved, a notice that the same had been stolen as hereinabove set forth, did not, by the purchase of said bonds, become a holder thereof in due course, but that at

such time the said respondent had knowledge of such facts that its action in taking such securities amounted to bad faith."

Decree went for petitioner here, which upon appeal, after a painstaking review of the authorities, was reversed. The cause was remanded for further proceedings.

The Illinois Negotiable Instrument Act provides:

"Holder in Due Course Defined. Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

"Notice of Infirmity—What Constitutes. Sec. 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The court below rightly concluded that the narrow question is this: "Did appellant have actual knowledge of the infirmity or defect, or knowledge of such facts that its action in taking the instrument amounted to bad faith?" It ruled, that, as a purchaser of negotiable instruments in good faith, before maturity and for a valuable consideration, respondent should be protected against a charge of bad faith which has no fact support other than the receipt of a notice circulated generally among dealers which stated that certain bonds of a large issue had been stolen.

Petitioner insists, that under the authoritative construction placed upon the Illinois Negotiable Instrument Law by her Supreme Court, since respondent had received information of the defective title, there was bad faith as matter of law, and no title passed. He strongly relies upon *Northwestern National Bank* v. *Madison and Kedzie State Bank*, 242 Ill. App. 22, and the denial of certiorari therein.

Under *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487, a definite construction of the negotiable instrument law by the State Supreme Court, binding upon the local tribunals, must be accepted by the Federal courts. But we cannot think that the ruling and action in the *Northwestern Bank* case amount to such a construction. That cause, decided by the Appellate Court, First Division, October,

1926, involved title to stolen bonds held by one claiming as a bona fide purchaser, after receipt of notice of the theft. The court there said: "The notice having been received by the proper agent of the bank to receive, open and acknowledge its mail in the line of his duties, we think the bank is estopped from claiming that it did not have actual knowledge of the defect in the title to the bonds it subsequently received." The State Supreme Court denied an application for certiorari without more. The argument is that this amounted to approval of the construction placed upon the statute by the Appellate Court. The point is not well taken.

National Bank v. *Uptown State Bank*, 273 Ill. App. 401, (1934) construed the statute differently, and made no reference to the earlier case. We cannot know upon what ground certiorari was denied. The Illinois Supreme Court has declared that "Whether one has notice of a certain fact is a question of fact and not of law;" *Paine* v. *Sheridan Trust & Savings Bank*, 342 Ill. 342, 348; also that denial of certiorari does not import approval of the reasons assigned by the lower court. *People, ex rel.* v. *Grant*, 283 Ill. 391, 397.

The Appellate Courts in Illinois are inferior tribunals and a statute provided that their opinions "shall not be binding authority in any case or proceeding other than that in which they may be filed." Illinois Constitution, 1870; Article VI, Section 11; Cahill's Illinois Rev. Stats. 1933, ch. 37, par. 49.

No authoritative construction of the negotiable instrument law of Illinois supports petitioner's position. And the court below rightly undertook to determine for itself the meaning and effect of the pertinent sections.

As with other enactments, the negotiable instrument law must be interpreted in view of the intended end—here, the free circulation of negotiable paper—and the meaning attributed by the courts to the language employed.

In a contest over title to stolen negotiable bonds, the Supreme Court of Michigan recently considered the Uniform Negotiable Instrument Law of that State. *National Bank* v. *Detroit Trust Company* (1932), 258 Mich. 526-536, 537. It held that one may purchase stolen negotiable bonds and acquire valid title as a holder in due course, although before the purchase, notice of the theft had come to him; but he may not willfully close his eyes to the notice, or resort to trick or artifice to avoid knowledge of its

contents, or purposely forget it. He must act in good faith. Concerning *Northwestern National Bank* v. *Madison and Kedzie State Bank, supra*, it said:

> "As far as we have been able to determine this case stands alone. It estops the purchaser from showing good faith at the time the bonds are acquired. It makes notice of theft conclusive evidence of mala fides. It overlooks the well-established rule that though one has received actual notice, if by forgetfulness or negligence he does not have it in mind when he acquires the bonds, he may still be a good-faith purchaser. It has been said that the test is one of simple honesty and good faith."

It approved *Lord* v. *Wilkinson*, 56 Barb. (N. Y.) 593, which rejected an instruction that "The defendants, once having had notice, are bound by it, although the notice may have been forgotten," and declared:

> "If the rule is well founded, that notice once given is good forever—that knowledge acquired when notice is given, is conclusive evidence of knowledge possessed when the notes were bought—then this charge is correct. But if the bona fides of the defendants must be judged of from their acts, purposes and knowledge as they existed upon the day of the purchase, then the notice served is only prima facie or presumptive evidence of mala fides, and may be rebutted by proof that the notice was lost, or its existence and contents forgotten."

The doctrine approved in Michigan should be accepted by the Federal courts, in the absence of an authoritative ruling in the state whose laws apply. It accords with what this court said in *Goodman* v. *Simonds*, 20 How. 343-365, 366, 367; *Murray* v. *Lardner*, 2 Wall. 110; *Vermilye & Co.* v. *Adams Express Co.*, 21 Wall. 138-146; *Shaw* v. *Railroad Co.*, 101 U. S. 557-564; and *King* v. *Doane*, 139 U. S. 166-173. Also with the view long enforced in England. *Raphael* v. *Bank of England* (1855), 33 Eng. Law and Eq. R., 276; *London Joint Stock Bank* v. *Simmons*, Appellate Cases 1892, 219; *Venables* v. *Baring Bros. & Co.* (1892), 3 Ch. Div. 527. Likewise with the conclusions of many state courts and writers of text books, as is pointed out in Daniel on Negotiable Instruments, 7th Ed. (1933), Secs. 885, *et seq.*, and the accompanying notes.

The challenged judgment must be affirmed. The cause will be remanded to the District Court for further proceedings.

Affirmed.